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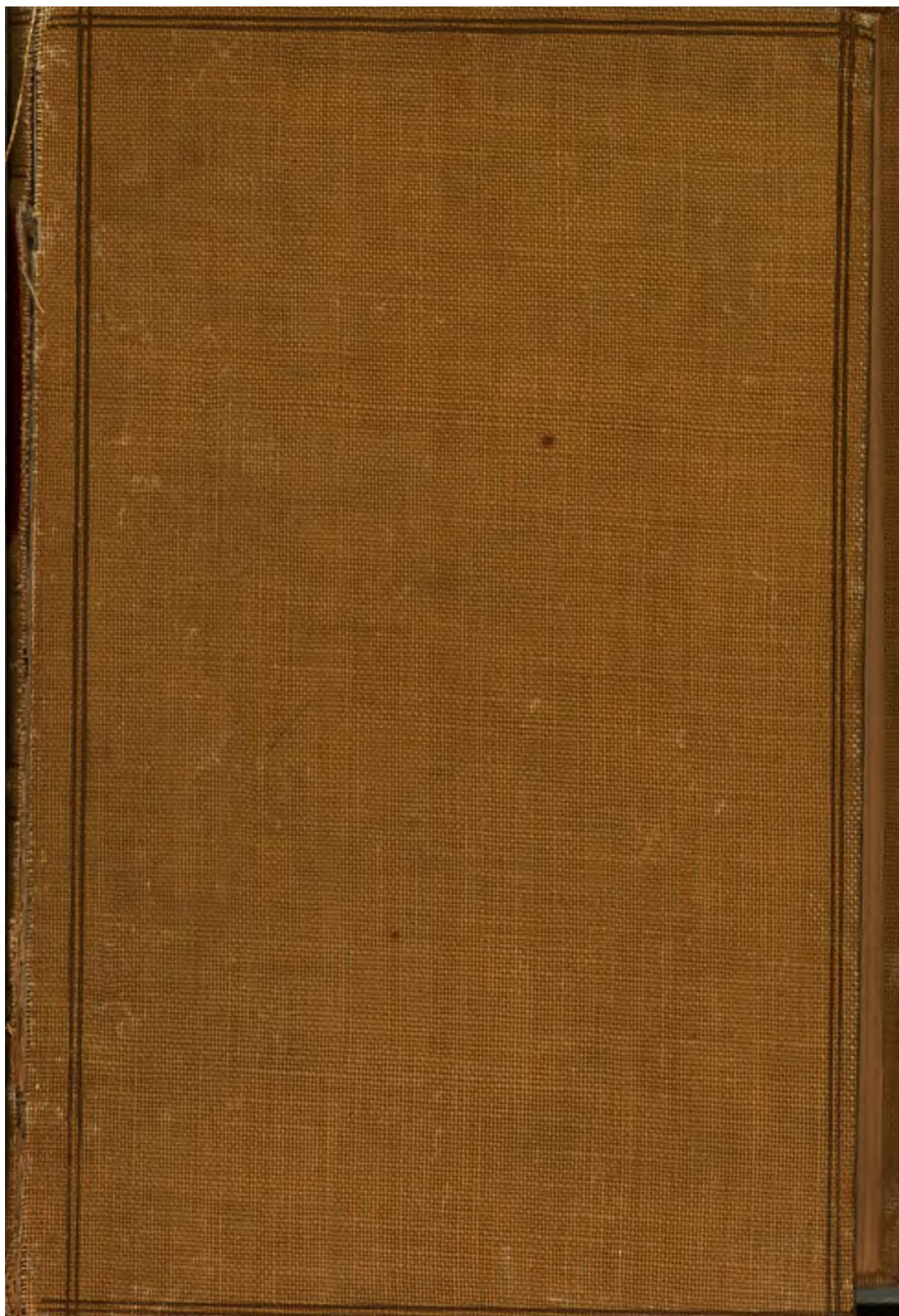
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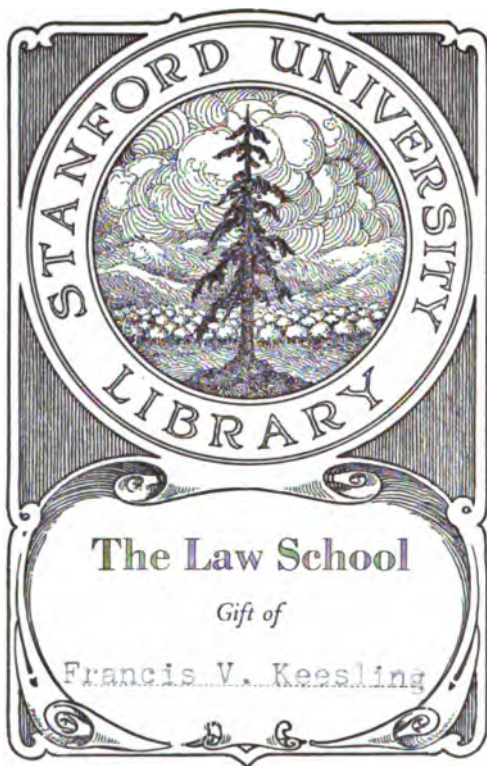
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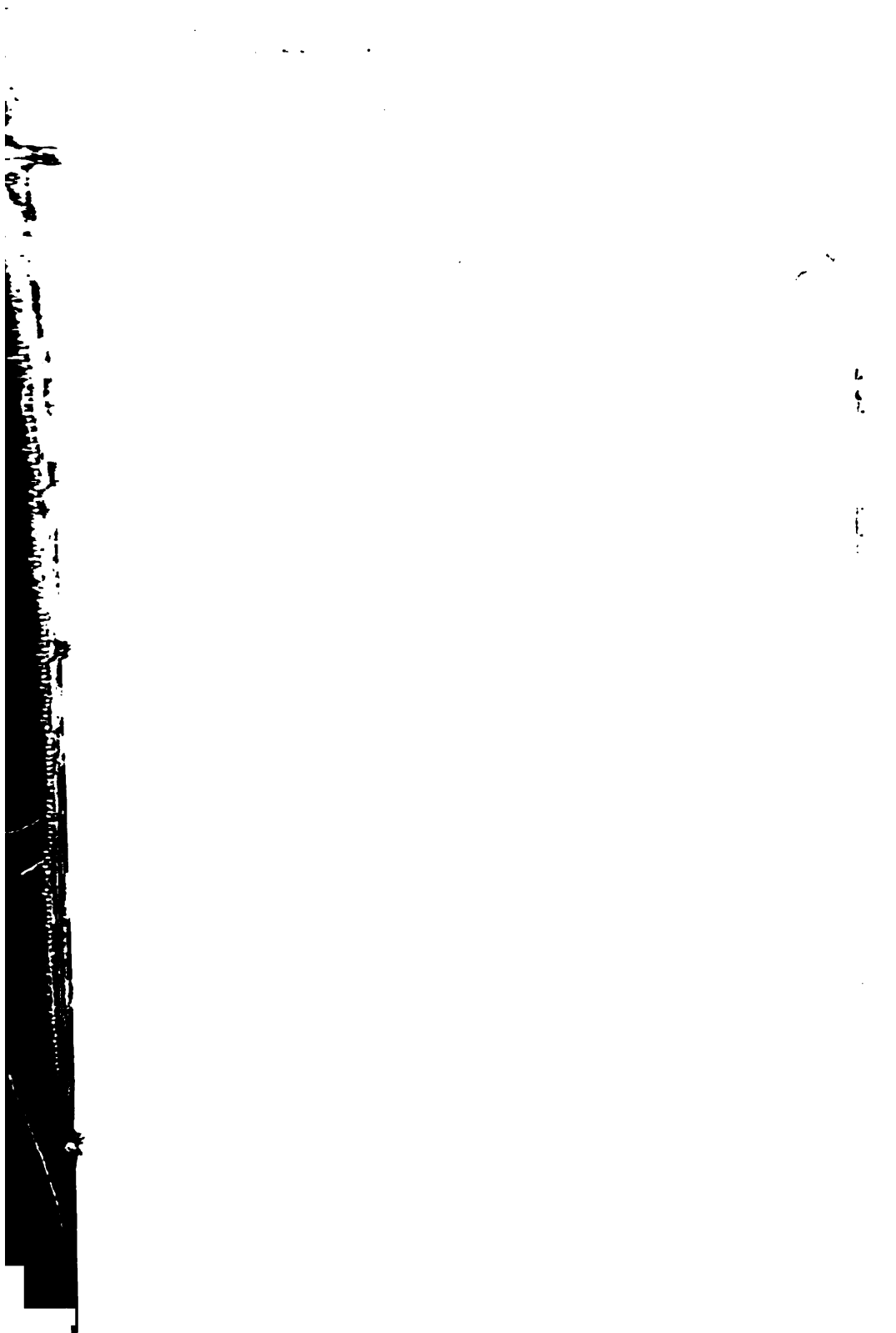
72

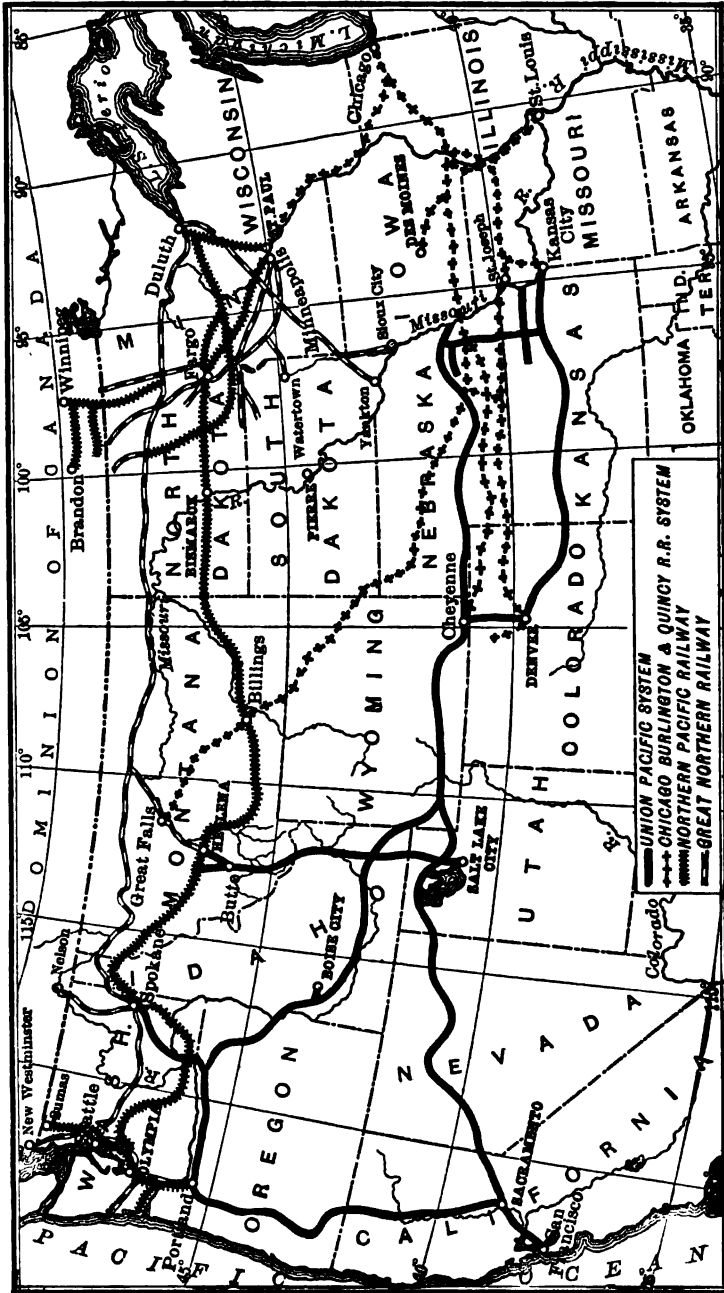
23

11

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TERRITORY AFFECTED BY THE MERGER DECISION. SEE PAGE 280.

THE
Interstate Commerce Act

AND

FEDERAL ANTI-TRUST LAWS

INCLUDING

THE SHERMAN ACT

**THE ACT CREATING THE BUREAU OF CORPORATIONS;
THE ELKINS ACT; THE ACT TO EXPEDITE SUITS IN
THE FEDERAL COURTS; ACTS RELATING TO
TELEGRAPH, MILITARY, AND POST ROADS;
SAFETY APPLIANCE LAW AFFECTING
EQUIPMENT OF CARS USED IN INTER-
STATE COMMERCE, WITH ALL
AMENDMENTS.**

WITH COMMENTS AND AUTHORITIES

AND

A SUPPLEMENT

**Embracing all Federal Legislation of 1906, relating to carriers and inter-
state commerce including the "Railway Rate Bill of 1906," The
Employers' Liability Bill, Pure Food Bill, Meat Inspection Bill
and the Hall-Mark or Jewelers' Liability Bill, with
full notes of decisions.**

BY

WILLIAM L. SNYDER,
OF THE NEW YORK BAR.

**NEW YORK:
BAKER, VOORHIS & COMPANY.**

1906

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PREFACE.

Congress, in the exercise of its power to regulate interstate commerce, in 1887 passed the first general law on the subject, which was approved February 4th of that year. The act is entitled "An Act to Regulate Commerce." In 1890 this Commerce Act was supplemented by an act to prohibit contracts in restraint of trade, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. This act is known as the Sherman Anti-Trust Law. It is universal in its application, and embraces not only carriers, but manufacturers and producers.

The principal object of the Interstate Commerce Act was to give to every man engaged commercially equality of opportunity, and to place all shippers as to rates and tariffs upon an absolute equality. The principal evil complained of, which complaints finally resulted in the passage of the Commerce Act, was the practice of discrimination by the great carrying and transportation companies, whereby they gave to certain favored shippers an unjust and unreasonable preference and advantage, by carrying their goods and commodities at a less rate than was given to their competitors. This discrimination enabled the favored shippers to undersell their competitors, destroy competition, and drive out of business thousands who had spent their lives in acquiring mercantile training, and had invested their means in mercantile pursuits.

Indeed in some instances it has been shown that the favored shippers directly benefited, were also officers and directors of the carrying companies giving the rebates.

The discrimination complained of was not confined to favoritism to individual shippers. Communities and localities were discriminated against by giving lower freight rates to points at a much greater distance from the point of origin, in the same general direction, thus enabling merchants in a particular locality to make prices which their competitors in less favored localities could not meet. The result was ruin to many business communities. Cities and towns on a line of railway were built up at the expense of other cities and towns. Merchants in one locality were discriminated against in favor of those in another to an extent that practically compelled those discriminated against to relinquish business. Equal opportunity was denied. Trusts and monopolies were the legitimate fruits of such discrimination. The favored shipper also became the favored manufacturer.

The discrimination aimed at included also discrimination among carriers themselves, who in some instances denied to competing connecting lines equal facilities for through transfers and connections.

The beneficial results which had been anticipated by those through whose instrumentality this remedial legislation had been secured were not realized. Prior to 1903, the statutes relied upon to secure the remedy were found to be difficult to enforce, due in a measure to the delay in securing an interpretation of the law by the Supreme Court of the United States. Commercial enterprises and business activity could not survive the

long delays which necessarily resulted. While the measure of relief was suspended, pending appeals from the Circuit Court to the Circuit Court of Appeals, and thence to the Supreme Court of the United States, not months only, but years elapsed. The delay amounted practically to a denial of justice. The merchant and shipper, who was unable to compete with a rival, favored by secret rebates, was in many instances unable to surmount the discouragements and difficulties, arising from conditions for which there seemed to be practically no redress.

It was plain that in order to secure the beneficial results of the existing body of legislation, additional legislation was necessary. The President of the United States, HON. THEODORE ROOSEVELT, in his message to Congress in December, 1902, referring to the subject declared: "A fundamental base of civilization is the inviolability of property; but this is in no wise inconsistent with the right of society to regulate the exercise of the artificial powers which it confers upon the owners of property, under the name of corporate franchises, in such a way as to prevent the misuse of such powers." Supplemental legislation was urged to render the Commerce Act and the Sherman Anti-Trust Law useful and practical. The result was the important legislation of 1903.

This legislation embraced three important statutes, to wit: the act of February 11, 1903, to expedite suits by abolishing appeals to the United States Circuit Court of Appeals in cases in which the United States is complainant, and authorizing appeals in such cases to be taken directly from the United States Circuit Court to the Supreme Court of the United States, and

giving to such suits and appeals a right of preference over other pending litigation. A most important step, designed to minimize delay. The act of February 14, 1903, creating the Department of Commerce and Labor and establishing a Bureau of Corporations. This statute conferred upon the Commissioner of Corporations the same power conferred by the Interstate Commerce Act upon the Interstate Commerce Commission. The object of the law was to secure information and data by investigations instituted under the act with respect to corporations, joint-stock companies, and combinations other than carriers engaged in interstate commerce. The act of February 19, 1903, known as the Elkins Act, increasing the powers of the Interstate Commerce Commission and authorizing it to institute proceedings not only against carriers charged with the practice of unjust discrimination, but against all persons who receive rebates, or the benefits conferred by such discrimination, amplifying the powers of the Commission with respect to evidence and the compulsory production of books and papers, and extending the jurisdiction of Federal courts in cases brought to enforce criminal proceedings for violations of the act, by declaring that indictments might be found in any district in which the act was violated, "or through which the transportation may have been conducted."

The legislation of 1903 has made the commerce legislation available and practicable. The evils sought to be remedied under the law may be grouped as follows: Evils growing out of the combination of independent producing corporations engaged in the manufacture and sale of necessities of life, to fix and maintain extortionate prices, designed primarily to destroy competi-

tors and drive out of business those not associated with the trust. Evils arising from merger of carrying corporations, designed to put the control of parallel competing lines of railroad in a single corporation and eliminate competition in rates of transportation, seeking thereby to accomplish more effectively the results sought to be accomplished by the pooling of freights among carriers, a practice expressly forbidden by section 5 of the Commerce Act.

The vital importance of this legislation is apparent. It operates upon the industrial world and affects the commerce of the country and the thrift and prosperity of the nation. Shall commerce be absorbed and controlled by particular combinations which exclude all others from participation therein? The controversies which have arisen under the Federal statutes on the subject, clearly demonstrated that such absorption is possible. The faithful enforcement of the acts of Congress seems to suggest the only remedy to secure active, healthy competition and afford to every man equality of opportunity.

Legislation is being sought also by the shippers and commercial bodies throughout the country to confer upon the Interstate Commerce Commission power to fix rates subject to review by the Circuit Courts of the United States. It is claimed that such legislation would be of more importance and practical benefit to shippers than any previous amendments to the act. A list of the bills which have been introduced to secure this remedy, which are now pending in the fifty-eighth Congress, will be found at page 193 of this work.

WILLIAM L. SNYDER.

TEMPLE COURT, NEW YORK,
July, 1904.

TABLE OF CONTENTS.

	PAGE.
Map — Territory affected by merger decision — Frontispiece.	Facing p. iii
Preface	iii-vii
Titles to acts of Congress cited	xv-xvii
Table of cases cited	xix-xxiii

CHAPTER I.

Constitutional provisions and authorities — Commercial questions	
— Personal and private rights	1-29
Constitutional provisions	3, 4
Police powers of the States	4
Sumptuary laws	9-14
Grain elevators	14
Taxation — State and Federal	15
Taxation — Drummers and commercial agents	27-29

CHAPTER II.

Interstate Commerce Act — Text and authorities	32-246
Sec. 1. Interstate commerce defined	32
Definitions — Railroads — Transportation	32, 33
Charges must be reasonable	33
2. Unjust discrimination defined	56, 57
3. Unreasonable preferences of advantages	69
Duty to connecting lines	69
4. Long and short-haul regulations, power of Commission as to	89
5. Pools and combinations prohibited	121
6. Schedules of rates and charges, schedules to be published..	128
Rates through foreign country	128
Notice of advance and reduction	129
Published rate alone legal	129
Documents to be filed	130
Advance or reduction of joint rates, power of Commission to publish rates	130
Deviation unlawful	131
Forms of schedules	131
Penalties for failure to publish	131, 132
Supplemented by Elkins Act, violation of Elkins Act a misdemeanor	133
Penalty for failure to publish	133
Soliciting or paying rebates	133, 134
Imprisonment abolished	134

X

TABLE OF CONTENTS.

	PAGE.
Sec. 6. Jurisdiction of Federal courts	134
Act of officer or agent	134
Published rate conclusive	135
Parties to proceedings	135
Adherence to rate, how enforced	135
United States District Attorney must act	136
Immunity of witnesses	137
Expedition Act of February 11, 1903, extended to Com- merce Act	137
7. Continuous carriage	145
8. Liability of carrier	146
9. Remedy of shipper	152
10. Criminal liability of carrier	174
Criminal liability of shipper	175
Joint liability of carrier and shipper	176
11. Interstate Commerce Commission created	181, 182
12. Powers of Commission	184
May compel attendance of witnesses	185
Penalty for disobedience	186
Testimony by deposition	186
Deposition, how taken	187
Foreign witnesses	187
Fees of witnesses	187
Supplemented by act of February 11, 1893	188
Immunity of witnesses	188
Perjury punished	189
Penalty for refusal to testify	189
13. Complaints, how made to Commission	209
Investigations, how conducted	209
Complaints by State Railroad Commissions	210
14. Reports of Commission	212
Reports, how published	212
15. Commission to notify carrier	213
Compliance of carrier	213
16. Disobedience of carrier	214
Power to issue injunction	215
Mandamus — Attachment	216
<i>Per diem</i> penalty	216
Appeal direct to Supreme Court	216
Trial by jury	217
Jury may be waived	218
Supplemented by Expedition Act of February 11, 1903....	219
Preference when United States a party	219
Appeal direct to Supreme Court	220
Federal courts always open	218
17. Procedure before Commission	225
18. Salary of Commission	226

TABLE OF CONTENTS.

xi

	PAGE.
SEC. 19. Sessions of Commission	227
20. Carriers must make annual reports	228
Uniformity of accounts	229
Supplemented by act of March 3, 1901	229-230
Monthly reports of accidents	229
21. Annual reports of Commission	231
22. Free or reduced rates	232
Excursion — Mileage — Commutation — 5,000 mile tickets.	233
Penalties .	234
23. Remedy by mandamus to move traffic and furnish cars	327

CHAPTER III.

Sherman Act — Text and authorities	247-303
SEC. 1. Trusts and monopolies unlawful	247-248
2. Misdemeanor to combine	294
3. Contract in restraint of trade illegal, penalty	295
4. Remedy, injunction, jurisdiction of Federal courts	295
Supplemented by chapter 755, Laws 1903 — Witness can-	
not be prosecuted	297
5. Additional parties	298
6. Trust property, when confiscated	298
7. Suits by individuals, treble damages	299
8. "Person" defined, includes corporation or association	303
73. Wilson Bill — Monopolies by importers prohibited	304
74. Wilson Bill — Remedy, injunction, jurisdiction, Federal	
courts .	305
75. Wilson Bill — Additional parties	305
76. Wilson Bill — Trust property may be confiscated	305
77. Wilson Bill — Suit by individuals, treble damages	306
34. Dingley Bill — Continues anti-trust sections of Wilson Bill	
in force	306

CHAPTER IV.

Bureau of Corporations — Text of Act of 1903, Chap. 552	307-317
SEC. 6. Bureau of corporations, its officers	307, 308
Power of Commissioner	308
Same power as Interstate Commerce Commission	308
Publication of information	309
Purpose of the statute	309, 310
Necessity of means to secure evidence	312
1. Department of Commerce and Labor created	314
2. Assistant Secretary of Commerce, powers and duties ..	314, 315
3. Duty of department	315
4. Officers, bureaus and divisions	315
5. Bureau of Manufactures	316

CHAPTER V.

	PAGE.
Act relating to Telegraph Companies — Military and post roads —	
Text and authorities	318-334
Sec. 1. Act of August 7, 1888 — Railroad may operate tele-	
graph	318, 319
5263. U. S. Rev. Stat., act of July 1, 1862, public domain open.	319
5264. U. S. Rev. Stat., right to take timber and land.....	319
5265. U. S. Rev. Stat., rights not transferable	320
5266. U. S. Rev. Stat., government messages	320
5267. U. S. Rev. Stat., government may purchase lines.....	320
5268. U. S. Rev. Stat., company must file acceptance under	
act of Congress	320
5269. U. S. Rev. Stat., penalties	320
Telegraph controlled by Congress	321
Taxation by State of telegraph companies	324
State laws as to telegraph companies	325
2. Act of 1888. Any company may connect with existing	
lines	329
3. Act of 1888. Interstate Commerce Commission may en-	
force statute	330
4. Act of 1888. Rights of Government enforced by Attor-	
ney-General	331
5. Act of 1888. Violation of act, misdemeanor	332
6. Contracts to be filed with Interstate Commerce Commis-	
sion	333
7. Rights to alter or amend statute reserved	334

CHAPTER VI.

Safety Appliance Law — Act of March 2, 1903, text and provisions	
of	335-341
SEC. 1. Power, driving-wheels, train brakes.....	335-336
2. Automatic couplers	336
3. Carrier may refuse unequipped car	336
4. Grab-irons and hand-holds	336
5. Drawbars, standard height prescribed	337
6. Penalties, how recovered	337-338
7. Extension of time to comply with act	338
8. Employees not deemed negligent	338-339
Act of 1903 supplemented by act of March 2, 1903, extend-	
ing its provisions to the Territories and District of Co-	
lumbia	339-341
2. Act of March 2, 1903. Power of Interstate Commerce	
Commission — Penalties ..	340
3. Act of March 2, 1903. Application of act.....	341

TABLE OF CONTENTS.

xiii

	PAGE.
Rules of Practice before Interstate Commerce Commission	342
Public Sessions, Rule 1.	342
Parties, Rule 2	342
Complaints, Rule 3	343
Answer, Rule 4	343
Notice or Demurrer, Rule 5	344
Service of Papers, Rule 6	344
Affidavits, Rule 7	344
Amendments, Rule 8	344
Adjournments and Extensions, Rule 9	344
Stipulations, Rule 10	344
Hearings, Rule 11	345
Depositions, Rule 12	345
Witnesses and Subpœnas, Rule 13	346
Findings and Briefs, Rule 14	347
Rehearing, Rule 15	347
Printing Pleadings, Rule 16	348
Copies, Papers, Testimony, Rule 17.....	348
Compliance with Order, Rule 18	348
Application by Carriers, Rule 19	348
Information, Rule 20	349
Address of Commission, Rule 21	349

FORMS.

Complaint before Commission	351
Complaint, another form.....	352
Answer before Commission	352
Notice of hearing	353
Subpœnas	353
Notice to take depositions	354

TITLES OF THE ACTS OF CONGRESS CITED AND REFERRED TO.

1884. CHAP. 60. AN ACT for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals. Approved May 29, 1884.
1887. CHAP. 104. AN ACT to regulate commerce. Approved February 4, 1887.
1888. CHAP. 772. AN ACT supplementary to the act of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, and also of the act of July 2, 1864, and other acts amendatory of said first-named act." Approved August 8, 1888.
1888. CHAP. 806. AN ACT to correct the enrollment of an act approved March 3, 1887, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the state courts, and for other purposes," approved March 3, 1875. Approved August 13, 1888.
1889. CHAP. 392. AN ACT to amend an act entitled "An act to regulate commerce," approved February 4, 1887. Approved March 2, 1889.
1890. CHAP. 647. AN ACT to protect trade and commerce against unlawful restraints and monopolies. Approved July 2, 1890.
1890. CHAP. 728. AN ACT to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases. Approved August 8, 1890. WILSON ACT.
1891. CHAP. 128. AN ACT to amend an act entitled "An act to regulate commerce," approved February 4, 1887. Approved February 10, 1891.

xvi TITLES OF ACTS RELATING TO INTERSTATE COMMERCE.

1891. CHAP. 517. AN ACT to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Approved March 3, 1891.
1891. CHAP. 555. AN ACT to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, and for other purposes. Approved March 3, 1891.
1892. CHAP. 14. AN ACT to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States. Approved March 9, 1892.
1893. CHAP. 83. AN ACT in relation to testimony before the interstate commerce commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February 4, 1887, and amendments thereto. Approved February 11, 1893.
1893. CHAP. 196. AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes. Approved March 2, 1893.
1894. CHAP. 349. AN ACT to reduce taxation, to provide revenue for the government, and for other purposes. Became a law without the President's signature, August 27, 1894. Known as the Wilson Bill.
1895. CHAP. 61. AN ACT to amend section 22 of an act to regulate commerce, as amended March 2, 1889. Approved February 8, 1895.
1897. CHAP. 11. AN ACT to provide revenue for the government, and to encourage the industries of the United States. Approved July 24, 1897. Known as the Dingley Bill.
1900. CHAP. 553. AN ACT to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes. Approved May 25, 1900. LACY ACT.
1901. CHAP. 866. AN ACT requiring common carriers engaged in interstate commerce to make full reports of all accidents to the interstate commerce commission. Approved March 3, 1901.

TITLES OF ACTS RELATING TO INTERSTATE COMMERCE. xvii

- 1903. CHAP. 544. AN ACT** to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted. Approved February 11, 1903. **THE EXPEDITION ACT.**
- 1903. CHAP. 552. AN ACT** to establish the department of commerce and labor. Approved February 14, 1903.
- 1903. CHAP. 708. AN ACT** to further regulate commerce with foreign nations and among the states. Approved February 19, 1903. **ELKINS ACT.**
- 1903. CHAP. 755. AN ACT** making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1904, and for other purposes. Approved February 25, 1903.

TABLE OF CASES CITED.

A.	Page.		Page.
Adams v. People State of New York	204	Champion v. Ames, No. 2....	37
Adams Express Co. v. Ohio..	20	Chicago Railroad v. Minne-	55
	21, 22, 23	sota	42
Addyston Pipe Co. v. United States	250, 251, 267, 272, 273, 285	Chicago Railroad v. Solan...	56, 156
Allen & Louis v. Oregon Rail-		ton Railroad	82
road	73	Chicago Railroad v. Osborne..	118
Allen v. Oregon Co.....	156	Chicago Railroad v. Becker...	171
American Refrigerator Co. v. Hall	22	Chicago Railroad v. Tompkins.	195
Anderson v. United States..	250	Cincinnati Railway v. Inter-	41, 92, 106
	251, 266, 267	state Com. Co.....	42
Asher v. Texas	28	Cleveland Railroad v. Illinois.	50, 53
Atlantic Tel. Co. v. Philadel-		Commonwealth v. Savage	8
phia	24	Covington Bridge Co. v. Ken-	17, 25
Atchinson Railroad v. Denver		tucky	87
Railroad	36, 235	Cowan v. Bond	197
Augusta Southern v. Wrights-		Counselman v. Hitchcock....	224
ville Railroad..	74, 84, 156, 239	Covington Stockyard Co. v.	250
Austin v. Tennessee	285	Keith	28
		Cohen v. Virginia	40
		Crutcher v. Kentucky	73
		Cutting v. Florida Railroad..	178
			5
			127
			292
			149
			156
			158, 206
			209
			27
			169

	Page.		Page.
Evershed v. London Railroad..	59	Interstate Com. Co. v. Louis-	
<i>Ex parte</i> Fiske	209	ville Railroad... 54, 71, 102,	116
<i>Ex parte</i> Koehler	236	Interstate Com. Co. v. Western	
<i>Ex parte</i> Lennon	156	Railroad ... 54, 55, 63, 93,	120
<i>Ex parte</i> Maier	8	Interstate Com. Co. v. Dela-	
<i>Ex rel.</i> United States Morris		ware Railroad	56
v. Delaware Railroad	240	Interstate Com. Co. v. Detroit	
<i>Ex rel.</i> United States Kings-		Railroad	64, 119
wood Coal Co. v. West Vir-		Interstate Com. Co. v. Atche-	
ginia Railroad	244, 245	son Railroad..... 88, 120,	222
		Interstate Com. Co. v. Ala-	
F.		bama	91, 94, 95, 98
Farmers' Loan and Trust Co. v.		Interstate Com. Co. v. United	
Northern Pacific	192	States	94
Fisk, <i>Ex parte</i>	209	Interstate Com. Co. v. South-	
Foster v. Scott	8	ern Railway	94, 102
Foot v. Buchanan	205, 296	Interstate Com. Co. v. Nash-	
		ville Railroad	117
G.		Interstate Com. Co. v. Clyde	
Geer v. Connecticut	5	Steamship Co.	120
Gen. Electric Co. v. Wise....	292	Interstate Com. Co. v. Baird..	127
Gibbons v. Ogden	47, 250	199, 200, 204, 205, 206, 211,	238
	261, 321	Interstate Com. Co. v. Brim-	
Gulf Railway v. Hefley	48	son	184, 205, 206
Gulf Railroad v. Miami Steam-		Interstate Com. Co. v. North-	
ship Co.	84	ern Railroad	192
		Interstate Com. Co. v. Louis-	
H.		ville	213
Hanley v. Kansas City Rail-		Interstate Com. Co. v. Lehigh	
road	45	Railroad	221
Hall v. De Cuir	52	Interstate Com. Co. v. Chicago	
Harris v. Cockermouth Rail-		Railroad	223
road	59	Interstate Com. Co. v. South-	
Hays v. Pennsylvania Railroad.	61	ern Pacific	223, 246
Harp v. Choctaw Railroad. 76,	79	Interstate Com. Co. v. Texas	
Hanks Dental Assn. v. Tooth		Railroad	224
Crown Co.	208	Interstate Com. Co. v. Western	
Hennington v. Georgia.. 9, 47,	52	New York Railroad	224
Henderson Bridge Co. v. Ken-		<i>In re</i> Debs	158, 206
tucky	23	<i>In re</i> Deninger	95
Home Ins. Co. v. New York...	27	<i>In re</i> Hohorst	156
Hohorst, <i>In re</i>	156	<i>In re</i> Lennon	159, 170
Holland v. Challen	169	<i>In re</i> Pooling Freights.. 122,	205
Hopkins v. United States.....	250	<i>In re</i> Rahrer	11
	251, 265	Iowa v. Chicago Railroad. 157,	161
Huse v. Glover	266		
		J.	
I.		Junod v. Chicago Railroad... 120	
Illinois Railway v. Illinois... 51			
Illinois Central v. Illinois....	52	K.	
Interstate Stockyards v. In-		Kelley v. Rhoads	18
dianapolis Railway.. 42, 75,	76	Kentucky Bridge Co. v. Louis-	
Interstate Com. Co. v. Cincin-		ville Railroad	156, 221
nati Railroad .. 36, 106, 191,	235	Kinnavey v. Terminal Railroad	
Interstate Com. Co. v. Baird.. 199		Assn.	54, 67, 68
	200, 204	Kizer v. Texarkana Railroad..	76
Interstate Com. Co. v. Balti-		Koehler, <i>Ex parte</i>	236
more Railroad 34, 36,	237		

TABLE OF CASES CITED.

xxi

L.	Page.		Page.
Lake Shore v. Ohio	52	New York and Northern v.	
Lafayette Bridge Co. v. City of		New York and New England	
Streator	294	Railroad	82, 87, 88
Leloup v. Port of Mobile.. 17,	38	New Orleans and Texas v. In-	
	325	terstate Com. Co.	191
Lehigh Valley Railroad v.		Northern Securities Co. v.	
Pennsylvania	46	United States	122, 125
Lennon, <i>Ex parte</i>	156		250, 275, 279
Lennon, <i>In re</i>	159, 170	O.	
Lehigh Valley Railroad v.		Oregon Short Line v. Northern	
Rainey	162	Pacific Railroad.. 83, 84, 87, 156	
Little Rock Railroad v. St.		Oregon Railroad v. Northern	
Louis Railroad	83, 85	Pacific	156
Little Rock Railroad v. East		Osborn v. Bank	156
Tennessee Railroad	86, 88	Ouachita Packet Co. v. Aiken..	266
Little Rock Railroad v. St.			267
Louis & Iron Mountain. 87,	88	P.	
Little Rock Railroad v. East		Parsons v. Chicago Railroad..	149
Tennessee	222	Packet v. St. Louis	266
Louisville Railway v. Missis-		Packet Co. v. Cattlesburg....	266
sippi	9, 40	People v. Bootman	8
Lottory Cases, The	38, 39	People v. Buffalo Fish Co....	8
Louisville Railroad v. Eubank.	90	People v. O'Neill	8
Louisville Railroad v. Behl-		Pennsylvania Railroad v.	
mer	95, 119, 151, 152, 156	Hughes	42, 43
Luxton v. North River Bridge		Pennsylvania Railroad v.	
Co.	41, 209	Jones	89
Lundquist v. Grand Trunk		Pearsall v. Great Northern	
Railroad	68	Railroad	250, 251
Lyng v. Michigan	28	Pensacola Tel. Co. v. Western	
		Union Tel. Co.	321, 323
M.		Pickard v. Pullman Car Co..	16
Manger v. People	8	Pollock v. Farmers' Loan and	
Maier, <i>Ex parte</i>	8	Trust Co.	15, 20
McCullough v. Maryland	325	Postal Tel. Cable Co. v. Adams.	20
Menacho v. Ward	242		26
Missouri Pacific v. United		Pooling Freights, <i>In re</i> ..	122, 205
States	36, 65, 181, 236	Price v. Bradley	8
Missouri Kansas Railroad v.		Prescott & Arizona v. Atchison	
Haber	42	Railroad	83
Minneapolis Railroad v. Min-		Primrose v. Western Union	
nesota	46	Tel. Co.	328
Missouri, K. & T. Railroad v.		Pullman Co. v. Pennsylvania..	22
Haber	47		
Minnesota v. Northern Securi-		R.	
ties Co.	157, 159, 160, 163	Ratterman v. Tel. Co... 17, 38, 325	
Morgan v. Louisiana	47	Railroad Co. v. Penniston.. 18, 19	
Montague v. Lowry.. 222, 250,	251	Ramussen v. Idaho	47
	273, 299, 302	Railroad Commission Cases..	50
Munn v. Illinois	14	Railroad Co. v. Richmond....	53
Murray v. Chicago Railroad..	61	Railway Co. v. Helfey.....	54
	149, 150	Railroad Co. v. Behlmer....	94
N.		Railway Co. v. Sandford.....	117
Nat. Cash Reg. Co. v. Leland..	209	Rattican v. Terminal Railroad.	149
New York, New Haven Rail-			150
road v. New York	47	Railway Co. v. Gonzalez.....	156

	Page.		Page.
Railroad Co. v. Pratt	242	Texas and Pacific Railroad v.	
Rahrer, <i>In re</i>	11	Wilder	209
Ratterman v. Western Union		Telegraph Co. v. Texas.....	324
Tel. Co.	325	The State Freight Tax	28
Reid v. Colorado	47	Tift v. Southern Railway..	35, 36
Regan v. Farmers' Loan &		72, 155, 170, 235	
Trust Co.	157	Tozier v. United States	118
Rhodes v. Iowa	12	Toledo R. Co. v. Pennsylvania	
Rich v. Braxton	169	Railroad	156
Rice v. Railroad Co.	242	Transportation Co. v. Parkers-	
Roth v. State	8	burg	266
Robbins v. Shelby	28		
		U.	
S.		United States v. Addystone	
Santa Clara County v. South-		Pipe Co.	99
ern Pacific	18	Union Pacific v. Botsford....	209
Scott v. Donald	14	United States v. Chesapeake	
Schooner Paulina's Cargo v.		Co.	290
United States	37	United States v. De Coursey..	63
Seeley v. Kansas City Star...	209	141, 178	
Sheldon v. Wabash Railroad..	161	United States v. De Goer	151
Shellabarger v. Oliver	209	United States <i>ex rel.</i> Morris v.	
Sloop Active v. United States.	37	Delaware Railroad	240
Smith v. Alabama	42	United States <i>ex rel.</i> Interstate	
Smyth v. Ames	44, 117, 169	Com. Co. v. Chicago Rail-	
Smith v. Northern Pacific Rail-		road	231
road	209	United States <i>ex rel.</i> Interstate	
Southern Express Co. v. United		Com. Co. v. Seaboard Rail-	
States Express Co.....	79	road	140
Social Circle Case	103	United States <i>ex rel.</i> King-	
State v. Bixman	8	wood Coal Co. v. West Vir-	
State v. Intoxicating Liquors.	8	ginia Railroad	244, 245
Starace v. Rossie	8	United States v. E. C. Knight	
State v. Rodman	8	Co.	250, 253, 255
St. Louis v. Tel. Co.	24	United States v. Fifty Boxes.	209
State Freight Tax, The	28	United States v. Jenkins....	63
Stoutenburgh v. Hennick	28	United States v. Joint Traffic	
Stockard v. Morgan	28, 29	Assn. ...	99, 122, 124, 250, 251
St. Louis Drayage Co. v. Louis-		264, 265, 286	
ville Railroad	83	United States v. Mossman	53
Stephens v. Overstolz	151	United States v. Morris.....	63
Stockwell v. United States... 151		United States v. Michigan	
State of Iowa v. Chicago Rail-		Railroad	65, 66, 178
road	157, 161	United States v. Moseley	227
St. Louis v. Western Union		United States v. Norfolk Rail-	
Tel. Co.	267	way	242, 243
Swift v. Pennsylvania Rail-		United States v. Northern	
road	162	Securities Co.	274
		United States v. Riley.....	151
T.		United States v. Swift.....	284
Taylor v. United States.....	151	286, 312	
Tabor v. Indianapolis Journal.	209	United States v. Trans-Mis-	
Texas and Pacific v. Interstate		souri Freight Assn.....	83, 99
Com. Co.	92, 94, 95	123, 158, 250, 251, 262, 263	
Texas Railway v. Interstate		286, 290, 291	
Com. Co.	107, 170, 184	United States v. Tozer.....	141
Tennessee v. Davis	156	Union Pacific v. Goodridge. 62, 148	

TABLE OF CASES CITED.

xxiii

V.	Page.		Page.
Vance v. Vandercook	14	Western Union Tel. Co. v. Ala-	
Van Brocklin v. Tennessee ...	19	bama	26
Van Patten v. Chicago Rail-		Western Union Tel. Co. v. Pen-	
road	54, 68, 156, 157	dleton	38, 325, 326
		Western Union Tel. Co. v.	
		James	325, 327
W.		Windsor Coal Co. v. Chicago	
Wabash v. Illinois	52	Railroad	62
Walker v. Keenan	224	Wight v. United States	64
Western Union Tel. Co. v. Pen-		Windsor v. Chicago Railroad..	147
dleton	16		
Western Union Tel. Co. v. Tag-			
gart	21	Z.	
Western Union Tel. Co. v.		Zych v. American Car and	
Massachusetts	22	Foundry Co.	209
Western Union Tel. Co. v. New			
Hope	24		

CHAPTER I.

Constitutional Provisions, Involving Commercial Questions and Personal and Private Rights.

In construing Federal statutes, designed to regulate interstate commerce, the courts must pass upon questions involving the limitation and extent of the powers delegated to Congress by the Constitution of the United States, and the powers which remain in the States or in the people, which were never delegated to the Federal government. These non-delegated powers embrace the right of a State to exercise its police power and to tax all property within its borders. They embrace the power to regulate domestic commerce or commerce conducted wholly within the State; the right of every citizen to trial by jury, as defined in the Federal Constitution; the right of a witness to be protected against self-incriminating testimony; the prohibition against the taking of life, liberty, or property without due process of law, and the right of every citizen to the equal protection of the laws, and to maintain the inviolability and integrity of every contract. Congress, in the exercise of the powers delegated to it, must frame its legislation so as not to impinge upon those powers remaining in the States, and so as not to deny or abridge the constitutional rights of any citizen.

A State has no power to legislate directly with respect to interstate commerce. Congress has no power to legislate with respect to domestic commerce. A

State cannot impose a tax upon interstate commerce. In the exercise of its power to tax, a State may tax, not only tangible property, but it may tax franchises conferred by it upon corporations of its own creation, notwithstanding the fact that such corporations may be engaged in interstate commerce. To what extent does this power extend when used to impose a tax upon tangible property employed as the means or instrumentalities of such commerce. To what extent may Congress legislate to raise revenue by imposing direct taxes which legislation impairs or diminishes the rights of the States to secure income from such source.

When commerce ceases to be domestic and becomes interstate, the power of the State to regulate or restrain it ceases and the power of the Federal government attaches. The statutes and local law of a State, with respect to domestic commerce, is supreme. An act of Congress, with respect to interstate commerce, is supreme. At what point and under what circumstances does State sovereignty cease and Federal authority begin.

Similar questions arise when an act of Congress is challenged upon the ground, either that it encroaches upon the police powers, which remain subject exclusively to the sovereignty of the State, or that it operates to deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws, or to the right to trial by jury, or compels a person to be a witness against himself, or impairs the obligation of a contract.

The chief constitutional provisions defining the powers delegated to the Federal government, and those reserved expressly to the States and which guarantee the rights of the citizen, are as follows:

CONSTITUTIONAL PROVISIONS.

Taxes.— No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Art. I, § 9.

Representatives, and direct taxes shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. Art. 1, § 2, as amended by amendment XIV, clause 2.

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. Art. I, § 8.

Commerce.— To regulate commerce with foreign nations, and among the several States. *Ib.*

Post Roads.— To establish post-offices and post roads. *Ib.*

To Legislate.— To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. *Ib.*

No State Duty.— No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another. Art. I, § 9.

Privileges; Immunities.— The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. IV, § 2.

Congress Supreme.— This Constitution, and the laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Art. VI.

Seizure and Search.— The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Amendment IV.

Witness against Himself.— No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. Amendment V.

Jury Trial.— In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Amendment VII.

Powers Reserved.— The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Amendment X.

Due Process of Law.— No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV.

The courts have construed these provisions of the organic law in connection with the various acts of Congress relating to interstate commerce and State legislation with regard to domestic commerce. Decisions bearing directly upon the statute will be found under the appropriate section of the act under which the discussion arose. Decisions which relate generally to the powers of Congress or the States, affecting commercial questions, and which do not relate to any particular clause of a Federal or State statute involving the power to regulate commerce, are, for convenience, grouped in this chapter.

The Police Power.— The people in framing the Federal Constitution did not delegate to Congress power to regulate the internal policy of a State, with respect to public health, public morals, or public order, within its borders. The power of the State to legislate as it sees

fit, in regard to these matters, is supreme. This power cannot be impaired or diminished by an act of Congress, even though its exercise may operate indirectly upon, or incidentally affect, interstate commerce. This rule is illustrated by the following authorities:

Police Power — State Legislation — Prohibiting Sale of Game and Fish.— A State may in the exercise of its police power prohibit the sale of trout within its borders, although such trout were lawfully caught in another State. A law making it a penal offense for a person to have such trout in his possession for sale is valid and not an unlawful interference with interstate commerce. *In re Deininger*, 108 Fed. Rep. 623 (April, 1901, C. C. Ore.); *Geer v. Connecticut*, 161 U. S. 519, followed.

Petitioner, who was convicted under the Oregon statute, applied for writ of *habeas corpus* and an order directing the sheriff to show cause why the writ should not be granted. Petitioner was manager of Cholpeck Fishing Co. at Portland, Ore., where it conducted a retail fish market. Trout were purchased in Seattle, Wash., where they were lawfully caught and shipped to petitioner to sell. Petitioner contended that the Oregon statute making possession of trout for sale, lawfully caught in another State, a penal offense, was invalid, as being in restraint of interstate commerce. The court denied the petition, and held that game brought from one State into another the moment it reaches the State of its destination, becomes part of the property within its borders, and subject to the control of the State in the exercise of its police powers, and that the statute complained of was a lawful exercise of such police power and was valid, and not an infringe-

ment upon the provisions of the Interstate Commerce Act. *Ib.*

State Game Laws — Consent of Congress to Enforcement of.
— With a view to allowing full force to the game laws of the several States, designed to protect wild game, and to prohibit the killing of certain birds and animals during particular seasons, Congress passed a law known as the Lacy Act, approved May 25, 1900 (Stat. 1900, chap. 553). This law was intended to make effective State game laws, in the same manner that the Wilson Act (Approved August 8, 1890) was intended to give force and effect to the sumptuary laws of the several States, with respect to the purchase and sale of intoxicating liquors. The Lacy Act provides as follows:

Section 3.— That it shall be unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory, or from the District of Columbia or Alaska to any State or Territory, or from any State or Territory to the District of Columbia or Alaska, any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State, Territory, or District in which the same were killed:

Provided, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or District in which the same are killed.

That all packages containing such dead animals, birds, or parts thereof, when shipped by interstate commerce, as provided in section one of this Act, shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages. For each evasion or violation of this Act the shipper shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the consignee knowingly receiving such

articles so shipped and transported in violation of this Act shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the carrier knowingly carrying or transporting the same shall, upon conviction, pay a fine of not exceeding two hundred dollars.

That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

This Act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl. (Statutes 1900, chap. 553, approved May 25, 1900; 31 Stat. at L. 187.)

Interesting questions have arisen under the game laws of the States, based upon the proposition that game is property, and that neither the State nor Federal Legislature can, by statute, deprive any person of property without due process of law. This elementary rule, however, is subject to the exercise of the police power, which authorizes the Legislature to prohibit the sale of articles of food which would be injurious to the public health. These statutes for the protection of game frequently make it a crime to "catch, kill, or be possessed of" game or fish in the close season. Possession of birds in the forbidden season, in violation of a State statute, is *prima facie* evidence that the possessor has violated the law. The burden is then on the party possessing to show that his possession is legal. He may show that he purchased the game in another State, at a time when it was law-

ful to kill and possess it in his own State; that he brought it into his own State, when it was lawful for him to possess it there; that after importing it he kept the merchandise in storage, and had it for sale, thereafter, and during the forbidden season, when by the statute his possession of it was declared unlawful. In such cases, assuming the game is wholesome and fit for food, the question arises whether the Legislature can make the purchase and possession of property a crime.

For State authorities construing laws of this character, see *People v. Bootman*, N. Y. Sup. Ct., First Dept., App. Div., June, 1904; *Foster v. Scott*, 136 N. Y. 577; *People v. Buffalo Fish Co.*, 164 N. Y. 93; *State v. Bixman*, 162 Mo. 1; *State v. Intoxicating Liquors*, 9 Me. 140; *Starace v. Rossie*, 69 Vt. 303; *Commonwealth v. Savage*, 155 Mass. 278; *Manger v. People*, 97 Ill. 320; *Roth v. State*, 51 Ohio St. 209; *People v. O'Neill*, 110 Mich. 324; *State v. Rodman*, 58 Minn. 393; *Ex parte Maier*, 103 Cal. 476; *Price v. Bradley*, 16 Q. B. Div. 148.

Police Power — Sunday Trains.— Statutes enacted by the Legislature of a State for the orderly observance of the Sabbath day are within the police power. It is within their province to pass any law having for its object the protection of the health and morals of its people, and to promote their welfare and happiness. It may, by proper statutory regulations, prescribe a rule of civic duty, applicable to its own citizens, and to those who enter or sojourn within its borders, on the Sabbath. The State of Georgia passed an act regulating the running of freight trains within the State on Sunday (Code 1882, § 4578), which forbade the moving of freight trains on that day, except as pre-

scribed by the statute. The law was penal in its nature and declared a violation of the act to be a misdemeanor. The Supreme Court of the United States sustained the validity of the statute as a police regulation, and affirmed a judgment of conviction under it. The court emphasized the fact that the statute related to freight trains, in or passing through the State, and observed that it did not attempt to regulate through passenger traffic. While conceding that the statute did, to a limited extent, affect interstate commerce, it could not be said to be an attempt on the part of the Georgia Legislature to regulate interstate commerce, but must be regarded as a wholesome and reasonable police regulation, to promote the morals and welfare of its people. *Hennington v. Georgia*, 163 U. S. 299.

Police Power — Jim Crow Cars.— It is within the police power of a State to prescribe that separate coaches shall be supplied by carriers within its borders for colored patrons. Such a statute, which has no application to interstate commerce, but which applies only within the borders of the State, cannot be abrogated by a judgment of the Federal Court, if it appears that the Supreme Court of the State has construed the statute, and has declared that its provisions were intended to and could apply only to transportation to and from points wholly within the State. So held in reviewing a statute of Alabama (Approved March 2, 1888), which had been construed by the Supreme Court of Alabama to relate to passenger traffic wholly within the State. *Louisville Railway v. Mississippi*, 133 U. S. 587.

Sumptuary Laws — Original Package Decision.— In the exercise of its police power a State may pass laws to

regulate or prohibit the sale of intoxicating liquors. Such laws have been passed from time to time, and are being passed. In some States the sale of intoxicants as a beverage is forbidden. These laws however were evaded and to a limited extent practically defeated by dealers who shipped liquor from outside the State. While the goods so shipped remained in original packages and were not mingled with the mass of property in a State, they remained subject to Federal control. Such shipments were held to constitute interstate commerce.

Sumptuary Laws — Wilson Act.— In order that the sumptuary laws of the several States might operate freely, with respect to intoxicants shipped from one State to another, Congress on August 8, 1890, passed a law known as "the Wilson Act" entitled "An Act to limit the effect of the regulations of commerce between the several States and with foreign countries, in certain cases," which provides as follows: "That all fermented, distilled or intoxicating liquors or liquids, transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Charles A. Rahrer, an agent of a Missouri firm of liquor dealers, sold in Topeka, Kan., liquors in original packages, immediately after the passage of the Wil-

son Act, shipped from Missouri to Topeka, without a permit or druggist's license required by the laws of Kansas. The Constitution of the latter State declared that the manufacture and sale of intoxicating liquors shall be forever prohibited therein, except for medical, scientific, and mechanical purposes; and the Kansas statute made it a misdemeanor to sell intoxicating liquors in the State, except for medical, scientific, and mechanical purposes; such sales to be made only by one having procured a druggist's permit.

Rahrer was arrested for selling liquor without a druggist permit, and sued out a writ of *habeas corpus*, and was discharged in the court below on the ground, as he contended, that the Kansas statute was not broad enough to embrace within its purview liquor imported from another State or country, and that the Kansas statute, after the passage of the Wilson Act, could not operate till re-enacted. The judgment was reversed by the Supreme Court, and the detention of Rahrer was held to be a valid detention. The court held that so far as imported liquors were concerned the law of Kansas, prior to the passage of the Wilson Act could not operate, because Congress had exclusive control of interstate commerce, but the moment Congress by the act of August 8, 1890, removed every obstacle to the operation of the State law, the latter became operative upon the merchandise within its borders, shipped from another State, and that a re-enactment of the Kansas statute after the act of Congress was not necessary. *In re Rahrer*, 140 U. S. 545.

Liquors in Transit.— The Wilson Act of August 8, 1890 (chap. 728, 26 Stat. 313), does not operate upon a con-

shipment of liquors while the goods are *in transit*, but only when they reach the point of destination, or delivery to the consignee.

A statute of Iowa (Code, § 1553), forbade any common carrier, its agents, or servants to "transport or convey between points, or from one place to another within the State" of Iowa for any other person or corporation, any intoxicating liquors, without a permit as prescribed by the statute. A violation of the act was declared an offense punishable by fine. Liquors were shipped from Dallas, Ill., to William Horn, at Brighton, Ia. When the goods arrived at Brighton, Rhodes, the station agent of the carrier, removed the goods from the station platform to the freight warehouse. He was convicted under the Iowa statute on the assumption that under the Wilson Act of August 8, 1890, the laws of Iowa became operative as soon as the liquors crossed the Iowa State line, or, in the language of the statute, "upon arrival" in the State. The conviction was reversed by the United States Supreme Court upon the ground that the Interstate Commerce Act was operative while the goods were *in transit*. That the laws of Iowa became operative under the Wilson Act only when the liquors reached the point of destination and delivery to the consignee. That the act of Rhodes in depositing the liquor in the freight warehouse, prior to delivery to the consignee, was an act done while the goods were *in transit*, and that so much of the Iowa statute as affected the merchandise, or acts done in handling it while *in transit*, was void. (May, 1898.) *Rhodes v. Iowa*, 170 U. S. 412.

Liquors for Private Use.— The right to send liquors from one State to another, and the act of sending, is

interstate commerce. A citizen of one State has a right to purchase liquors in another State, to be sent to him in his own State, for his private use, and cannot be deprived of such right by statute. In the exercise of its police power, a State may forbid the sale of liquors therein.

A California corporation owning extensive vineyards, and engaged in the manufacture of wines and brandies in that State, sold liquors to citizens of Charleston, S. C., for private consumption. They consigned also to that city large quantities of liquor to be stored in its warehouse, and to be sold to its customers in original packages. The Charleston authorities, under a statute of South Carolina, known as the State Dispensary Law (Approved Jan. 2, 1895, as amended March 6, 1896, and March 5, 1897) attempted to seize and confiscate the liquors. The corporation filed a bill in equity in the United States Circuit Court and secured an injunction to restrain the State officers from seizing the liquor. The court below made the injunction perpetual, as to all the merchandise, on the assumption that while the liquors remained in original packages, the State law could not operate. The decree was reversed in part, by the United States Supreme Court, upon the ground that the injunction was proper, only in so far as to protect the liquor sent to South Carolina to citizens, not for sale by them, but for their private consumption. As to the liquors stored in complainants' warehouse, for sale in the State of South Carolina, the courts held that such liquors became subject to the provisions of the State Dispensary Law, by virtue of the operation of the Wilson Act of August 8, 1890; and as to such goods the order restraining the

State officers from seizing the liquors was reversed and the injunction vacated. (May, 1898). *Vance v. Vandercook*, 170 U. S. 438, citing *Scott v. Donald*, 165 U. S. 58.

Grain Elevators — Power of State to Regulate.—The Legislature of a State has power to control the business of elevating and storing grain, within its borders, when carried on by individuals or associations. And the exercise of such a power is not a regulation of interstate commerce. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391.

The State of North Dakota passed a law (Laws 1891, chap. 126), entitled “An Act to regulate public warehouses and warehousing and inspection of grain and to give effect to Article 13 of the Constitution of the State fixing charges and fees.” One Brass owned and operated a grain elevator at Grand Harbor, N. D., for the purpose of buying, selling, storing, and shipping grain for profit. He refused to receive grain from Stoesser, unless the latter paid him therefor compensation in excess of the rate prescribed by the Dakota statute. The court issued an alternative writ of *mandamus* on Stoesser’s petition to which Brass made return claiming that he used the elevator for his own grain, and that he stored and shipped grain for others, for profit and gain, as a mere incident to his business. Stoesser demurred to the return, the demurrer was sustained, and the court issued thereon a peremptory writ. The Supreme Court sustained the judgment and held that the statute of North Dakota was valid, and was not a regulation of interstate commerce. That when Brass entered into the business of storing grain for others, for gain and profit, he was bound by the

statute, and could not escape its provisions by claiming that he also elevates and stores his own grain in the same warehouse. "As well might a person accused of selling liquor without a license," observes the court, "urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident." *Brass v. Stoeser*, 153 U. S. 391.

Taxation.— One of the most important questions which constantly arises involving the limitation of State and Federal authority, relates to taxation. The States never surrendered to Congress the power of direct taxation on property within the borders of a State. From the exercise of this power, the States derive their principal source of income. While the States retained the power to levy direct taxes within their borders, they gave Congress power "to lay and collect taxes, duties, imports, and excises." These are indirect taxes enforced by Congress in its various tariff laws. The States also gave Congress power to levy and collect direct or capitation taxes, according to the number of inhabitants in the respective States, counting the whole number of persons in each State, excluding Indians not taxed. All taxes levied by the Federal government must be uniform. The States also delegated to Congress the power to "regulate" commerce with foreign nations and among the several States. This latter grant of power precluded the States from taxing interstate commerce. The mode in which Congress could levy and collect a direct tax was discussed in the "income tax cases." (*Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429; April, 1895); s. c., denying re-argument (May, 1895) 158 U. S. 601. See *infra*. The

other branch of the discussion, upon which the authorities are not entirely harmonious, relates to taxation upon interstate commerce, or rather upon instrumentalities engaged in interstate commerce.

Taxation of Commerce — States Have No Power to Tax.—

The power granted to Congress by the Constitution to regulate commerce among the several States is an exclusive power which Congress alone can exercise. Any State regulation therefore, which may in any wise affect interstate commerce, will be construed as an assumption on the part of the State to regulate commerce, and will be declared unconstitutional and void. While a State may tax all property and commodities within its borders and may regulate commerce which is conducted exclusively within its confines, it cannot levy a tax upon traffic or commerce when the conduct of such traffic extends beyond the State line. When traffic is conducted in such a manner as of necessity to extend in its operations from points in one State to points in one or more other States, it becomes interstate and can be regulated only by Congress, and it alone has power to occupy by legislation the whole field of interstate commerce.

Accordingly it has been held that for a State to pass any law imposing a tax upon "the transit of passengers from foreign countries, or between the States, is to regulate commerce." *Pickard v. Pullman Car Co.*, 117 U. S. 34.

Interstate commerce includes not only the exchange and transportation of commodities or visible tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. *Western Union Tel. Co. v. Pendelton*, 122 U. S.

347; *Rattan v. Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

The Legislature of Kentucky passed an act to regulate tolls to be charged or received from passengers over a bridge spanning the Ohio river extending from the Ohio shore to the Kentucky shore, between the cities of Cincinnati and Covington. The bridge was controlled by the Covington and Cincinnati Bridge Company, a corporation existing under the laws of both States. The Kentucky statute was held to be unconstitutional, as an assumption of the power to regulate commerce. The court observed that commerce embraced also intercourse “ and the thousands of people who daily pass and repass over this bridge may be truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry, a tax upon the commerce across a river.” *Covington Bridge Co. v. Kentucky*, 154 U. S. 204.

The Legislature of Wyoming passed an act taxing all live stock brought into the State “ for the purpose of being grazed.” Plaintiff owned a flock of sheep, which he designed to ship by rail from Pine Bluffs Station in the State of Nebraska. He drove the sheep from a point in Utah 500 miles across the State of Wyoming *en route* to Pine Bluffs. While the sheep were being driven through Laramie county, Wyoming, a tax of \$250 was imposed upon them under the Wyoming statute. Plaintiff sued to recover back the tax upon the

ground that it was imposed upon property engaged in interstate commerce, and the law authorizing it was unconstitutional. *Held*, that the sheep were not brought into Wyoming for the purpose of being grazed there permanently, but for the purpose of taking them to market in another State. That although the sheep were maintained by grazing along the route of travel and could have been shipped by rail directly from Utah, yet the owner had a right to avail himself of such means of transportation as he preferred. That his sheep were property engaged in interstate commerce which the State of Wyoming had no power to tax. *Kelley v. Rhoads*, 188 U. S. 1.

Taxation — Federal Corporation.— A State may create a transportation corporation. A railroad may be organized under the laws of a State, and may also receive aid from Congress, and may receive franchises pursuant to an act of Congress. If it appears that it was not the purpose of the Federal statutes in conferring franchises upon a State corporation to sever the allegiance which the corporation owes to the State, or to transfer the powers and privileges conferred by the State, the State has power to tax the property of the corporation within its borders; but the State cannot tax its franchises derived from Congress, nor include such franchises in the assessment on which the State tax is based. *Central Pacific Railroad v. California*, 162 U. S. 92.

The court in its opinion in the above case cited and commented on the authorities in *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394; *California v. Central Pacific Railroad*, 127 U. S. 1; *Railroad Co. v.*

Peniston, 117 U. S. 151; *Van Brocklin v. Tennessee*, 117 U. S. 177.

Income Tax Cases.— The several States, or the people of the United States, in conferring upon Congress the power to lay and collect taxes limited the power and defined the mode in which it should be exercised by providing (Article I, section 9) that “ no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.” Article I, section 2, of the Constitution (third clause), provides that Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union according to their respective numbers. The whole number of persons in each State shall be counted, Indians not taxed excluded. As amended by art. 14, § 2, ratified July 28, 1868.

The States reserved as their principal remaining source of income the power of direct taxation. Direct taxes include taxes on real estate, taxes on rents or income derived from real estate, taxes on personal property, and taxes on the income of personal property.

If Congress should exercise the power to impose a direct tax, such tax must be apportioned according to representation, and according to numbers. It can exercise the power in no other way.

The act of Congress, passed August 15, 1894, known as the Income Tax Bill entitled, “ An Act to reduce taxation, to provide revenue for the government and for other purposes ” provided for a tax of 2 per cent. on the amount derived over and above \$4,000, “ upon the gains, profits and income derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation carried

on in the United States or elsewhere, or from any other source whatever.”

Held to be a direct tax, within the meaning of the Constitution and void because not apportioned accordingly to representation and numbers, as prescribed by the Constitution. (April, 1895.) *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429; s. c., denying re-argument (May, 1895), 158 U. S. 601.

Power of State to Tax — Unit Rule.—The transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be subjected directly to State taxation. Property belonging to corporations or companies engaged in interstate commerce may be taxed by the State in which such property is located. And whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of government, under whose protection they conduct their operations; and taxation on property, collectible by the ordinary means, does not affect interstate commerce, otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government. *Adams Express Co. v. Ohio*, 165 U. S. 194; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688.

Unit Rule of Taxation.—The Legislature of Ohio passed a law (Laws 1893, chap. 90, approved April 27, 1893), known as the Nichols Law, which provided a unit rule as to the value of the property of a corporation

existing in many States by declaring that the taxing officer, in fixing the value for purposes of taxation of the property to be taxed in Ohio, should be guided by the value of the entire capital stock of the company, and other evidence bearing on the true value in money of the entire property in Ohio, in the proportion which the same bears to the entire property, as determined by the value of its capital stock and other evidence. The validity of the law was assailed. The court sustained the law, and held that the statute did not require the tax officer to base the value for taxation purposes on the value of the entire capital stock, making the respective values equivalent; but taking market value of stock as a datum the board was to be guided thereby in ascertaining the true value in money of the company's property in the State. The fact that the property was valued as a unit was not objectionable. The value of property depends on the use it is put to, and it may be assessed at the value it has as used, and by reason of its use. *Adams Express Co. v. Ohio*, 165 U. S. 194.

For construction of a similar statute (Laws Indiana, chap. 171, approved March 6, 1893), under which value of the property of a telegraph company was taxed, on the basis of such a proportion of whole value of stock as length of lines within State bears to length of all lines, deducting sum equal to value of real estate and machinery, see *Western Union Tel. Co. v. Taggart*, 163 U. S. 1.

Taxation of Property Used in Interstate Commerce.— A State has power to tax all the property within its borders, if the tax imposed does not infringe upon the freedom of interstate commerce, or deprive those engaged

therein of the equal protection of the laws. *American Refrigerator Co. v. Hall*, 174 U. S. 70.

The constitutional and statutory provisions of the State of Colorado required the assessment of a tax on all property in the State owned, used, or controlled by railway companies, telegraph, telephone, and sleeping or palace-car companies. The Colorado authorities required all carriers to file annually a list of all its rolling stock used within the State and the proportion of rolling stock used upon leased lines, within the State, in detail. Plaintiff, an Illinois corporation, filed a bill in the District Court of Arapahoe county, Colo., to restrain the defendant Hall, treasurer of the county, from enforcing the payment of taxes imposed by defendant, assessed upon its refrigerator cars, used in the transportation of perishable freight over various lines of railroad throughout the United States, upon the ground that the tax was a State tax imposed upon interstate commerce, which the Legislature of Colorado had no power to impose. Plaintiff had judgment below awarding a perpetual injunction as prayed for, which judgment was reversed by the Supreme Court of Colorado. The carrier appealed to the Supreme Court of the United States which affirmed the judgment dissolving the injunction. It was stipulated on the record that if the tax was valid, the amount imposed was just and reasonable. The court held that the mere *situs* of the carrier's property could not be invoked to enable it to escape bearing in each State such burden of taxation as a fair distribution of the actual value of its property among those States requires. Citing *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Pullman Co. v. Pennsylvania*, 141 U. S. 18; *Adams Express Co. v. Ohio*, 165 U. S. 194.

Held further that the Colorado statute imposed no burden on the business of the carrier, but contemplated only an assessment of a tax upon property within the State, and that it was competent to ascertain the number of the cars to be subject to taxation by inquiry into the average number used in the State within the year; and the fact that the cars taxed were used as vehicles of transportation in the interchange of interstate commerce did not render the tax invalid. *Ib.*

See also authority sustaining a Pennsylvania statute (Approved June 7, 1879) authorizing a tax of 1-8 of 1 per cent. on gross receipts of railway companies for tolls and transportation on tracks within the State. *Erie Railroad v. Pennsylvania*, 158 U. S. 431.

An Ohio statute authorized a tax upon the tangible property of an express company within the State. Such tax is not a privilege tax. It is not a tax imposed for the privilege of doing business, but is a tax on tangible property within the State which the Legislature of the State has a right to tax. A franchise to be is only one of the franchises of a corporation. A franchise to do is an independent franchise, and is as much tangible property and a thing of value as the franchise to be. Rule as to mode of ascertaining tangible property of a corporation which a State may tax stated. *Adams Express Co. v. Ohio*, 166 U. S. 185; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150.

Taxation of Property Used in Interstate Commerce, Continued.

— There is a marked distinction in an attempt by a State or municipality to regulate or impose a burden on interstate commerce, and the taxing of property of a corporation engaged in interstate commerce. The borough of New Hope, Pa., passed an ordinance im-

posing an annual license fee of \$1 per pole, and \$2.50 per mile of wire on the telegraph, telephone, and electric-light poles, within the limits of the borough. It was claimed that such property, while it could not be excluded from the streets and avenues of the borough, is not exempt from the police regulations of the municipality. *Held* that such a license was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such, not in itself obnoxious to the commerce clause of the Constitution. *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, citing *St. Louis v. Tel. Co.*, 148 U. S. 92; 149 U. S. 465.

Reasonableness Question for Jury.— What would be a reasonable tax upon property of a corporation engaged in interstate commerce, which property justifies police supervision, in one locality, would not be regarded as reasonable in another. The question as to whether a tax ordinance is reasonable or unreasonable may be a question of law for the court, but the question as to whether the amount of the tax fixed by the ordinance is reasonable or not is usually a question of fact for the jury. *Atlantic Tel. Co. v. Philadelphia*, 190 U. S. 160.

The city of Philadelphia passed an ordinance imposing an annual license tax on the poles and wires of the Atlantic Telegraph Company, within the limits of the city. This ordinance fixed the license fees the same as the fees imposed by the borough of New Hope, in an ordinance sustained by the Supreme Court in the *New Hope* case, 187 U. S. 419, *supra*. But the court said that what might be reasonable in the borough of

New Hope might not be reasonable in the city of Philadelphia. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country. The reasonableness of the license was a question for the jury, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. *Ib.*

A Kentucky statute (Laws 1890, approved March 31st), declared that it should be unlawful for the Covington and Cincinnati Bridge Company, to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river, with *termini* at Covington, Ky., and Cincinnati, O., any toll, fare, or compensation greater than the rates prescribed and designated in the act. The court held that the statute was a State regulation which imposed a tax on interstate commerce, and was void. That the traffic across the Ohio was interstate commerce, the bridge was an instrument of such commerce, and Congress alone could prescribe a uniform scale of charges. That the power of the Kentucky Legislature was limited to fixing tolls on such channels of commerce as are exclusively within its territory. *Covington Bridge Co. v. Kentucky*, 154 U. S. 204.

A Mississippi statute (Laws 1888, chap. 3, approved March 8th), authorized a revenue tax on business conducted within the State. The tax required to be paid by telegraph companies was \$3,000 on each company operating 1,000 miles or more of wire within the State, and if the company operated less than 1,000 miles, the tax imposed was \$1 per mile. The tax was declared to be "in lieu of other State, county and municipal

taxes." The court sustained the law in an action by a company engaged in interstate commerce, as a tax on the property of the company within the State, and not a tax on interstate commerce. *Postal Tel. Co. v. Adams*, 155 U. S. 688.

A statute of Alabama (Laws 1885, approved Feb. 17th, § 13) imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it," in the State of Alabama. The Western Union Telegraph Company did business in Alabama, and had accepted the provisions of §§ 5263-5268, U. S. Rev. Stat. It paid tax on gross receipts of all business done wholly within the State. It was required to return gross receipts on all business done partly within the State on messages carried partly within and partly without the State. *Held*, that the statute so far as it required returns on receipts for messages carried partly within and partly without the State was a regulation of interstate commerce, which the State had no power to enforce. *Western Union Tel. Co. v. Alabama*, 132 U. S. 472.

Taxation of Commerce — Filing of Charter by Foreign Corporation.— A State may lawfully pass a law requiring a foreign corporation as a condition precedent to transacting business therein, to file with its Secretary of State a copy of its charter, and pay a fee of \$25 for so doing. The State of Wisconsin passed such a law (Wisconsin Statutes 1898, §§ 1770b, 4978). The statute further provided that every contract made by such foreign corporation, affecting the personal liability thereof or relating to property within the State, before compliance with the statute should be void. *Held*, that such a statute did not necessarily operate to regulate

interstate commerce, so as to conflict with "the power of Congress in that regard," nor was a contract made intermediate the passage of the act and the date when it became operative, impaired by the provisions of the act. *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611.

Tax on Dividends.—The State of New York passed a law (Laws 1881, chap. 361) imposing a tax upon "the corporate franchise or business of corporations," measured by the extent of the dividends of the corporation. *Held* to be a privilege tax upon the right to be a corporation and do business in the State, and not a tax upon the privilege or franchise which, when incorporated, the company might exercise. That the New York law was valid, though a portion of the dividends may be derived from interest on capital invested in United States bonds. *Home Ins. Co. v. New York*, 134 U. S. 594.

Taxation of Commerce — Drummers and Agents.—The board of aldermen of the city of Greensboro, N. C., pursuant to a State statute, conferring power to do so, passed an ordinance assessing a license fee of \$10 a year on all persons in Greensboro engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face. The Chicago Portrait Co., an Illinois corporation, sold pictures in Goldsborough, and sent them to its agent in that city for delivery to purchasers. The agent failed to secure a license, under the Greensboro ordinance, and was convicted for a violation of the ordinance and fined \$10. The conviction was affirmed by the Supreme Court of North Carolina, and defendant appealed to the Supreme Court of the United States and claimed

that the Greensboro ordinance was void, as a tax by State authority on interstate commerce. The conviction was reversed upon the ground that transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce which cannot be subject to State taxation. *Caldwell v. North Carolina*, 187 U. S. 622.

It was urged that the tax or license fee was not confined to persons in other States, but was a uniform tax on all vendors in Greensboro, whether residents or nonresidents, and made no distinction between domestic and foreign drummers. The court held that this uniform provision did not meet the difficulty. That interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. Citing *The State Freight Tax*, 15 Wall. 232; *Stockard v. Morgan*, 185 U. S. 27; *Brennan v. Titusville*, 153 U. S. 289; *Robbins v. Shelby*, 120 U. S. 289; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Henrick*, 129 U. S. 141; *Lyng v. Michigan*, 135 U. S. 161; *Crutcher v. Kentucky*, 141 U. S. 47. And that efforts to control this kind of commerce, in the interests of States, where purchasers reside, in the form of statutes and ordinances have universally failed. *Ib.*

Although the State has general power to tax individuals and property within its jurisdiction, it has no power to tax interstate commerce, even in the person of a resident of the State. A statute of Tennessee imposed a privilege tax on persons and citizens in the State engaged in business, as brokers in merchandise. Complainants did business in Chattanooga as representatives of nonresident parties, firms, or corporations,

and solicited orders for goods from jobbers or wholesale dealers, for principals residing without the State. When such orders were obtained the nonresident principal shipped the goods to the Tennessee agents, who delivered them to the purchasers. *Held*, that the effect of the Tennessee statute was to impose a tax upon interstate commerce, and was void, as in violation of the interstate commerce clause of the Constitution. *Stockard v. Morgan*, 185 U. S. 27.

Peddler's Licenses.—A statute of Missouri (Rev. Stat. 1889, chap. 125) made it a misdemeanor for hawkers and peddlers selling goods by going from place to place to do so without procuring a license. The statute made no distinction between residents and non-residents. The defendant was convicted and fined for a violation of the statute, not having obtained a license. On appeal to the Supreme Court the conviction was affirmed and the statute upheld as a valid exercise of the power of the State over persons and business within its borders, regulating the occupation of itinerant peddlers and hawkers. The evidence showed that defendant sold sewing machines going from place to place in a wagon. There was no proof that he ever offered for sale a machine he did not have with him. His dealings were never accompanied nor followed by a transfer of goods from another State, or of an order for their transfer from one State to another. Defendant's transactions were neither interstate commerce, nor in any way connected with interstate commerce. The business was solely internal and domestic. *Emert v. Missouri*, 156 U. S. 296.

CHAPTER II.

INTERSTATE COMMERCE ACT

ENTITLED

"An Act to Regulate Commerce."

[Approved Feb. 4, 1887. In effect April 5, 1887. U. S. Stat. at L. Vol. 24, p. 379.]

ANALYSIS OF THE STATUTE.

- Sec.** 1. Carriers engaged in transportation — Definitions — Terms, "Railroad," "Transportation" — Charges must be reasonable.
2. Unjust discrimination defined.
3. Unreasonable preference or advantage — Duty to connecting lines.
4. Long and short haul regulations — Power of Commission as to.
5. Pools and combinations prohibited.
6. Schedule of rates to be published — Rates through foreign country — Notice of advance or reduction of rates — Published rate only legal rate — Documents to be filed with commission — Notice of advance or reduction of joint rates — Power of commission to publish rates — Deviation from published rate unlawful — Forms of schedules — Penalties for failure to publish rates — Supplemented by Elkins Act — Approved February 19, 1903 — Violation of act misdemeanor — Penalty for violation of published rate — Soliciting or paying rebate a misdemeanor — Imprisonment abolished — Jurisdiction of federal court — Act of officer or agent — Act of carrier — Published rate, when conclusive — Parties to proceedings — Adherence to rate, how enforced — U. S. district attorney must prosecute at request of attorney-general — Immunity of witnesses — Expedition Act approved February 11, 1903, extended to such proceedings — Repealer.

- Sec. 7.** Continuous carriage from point of shipment to point of destination.
- 8. Liability of carrier in damages.
- 9. Remedy of shipper in alternative by complaint to commission or suit in federal court.
- 10. Criminal liability of carrier for violation of act — Criminal liability of carrier for false bills, weights, or classification — Criminal liability of shipper for false bills, weights, or classification — Joint and several criminal liability of shipper and carrier.
- 11. Interstate commerce commission created.
- 12. Commission may prosecute through U. S. district attorney — Witnesses' attendance compulsory — Penalty for disobedience of witness — Testimony taken by deposition — Deposition, how taken — Foreign witnesses — Fees of witnesses — Supplemented — Act of February 11, 1893 — Immunity of witness — Perjury punished — Penalty for refusal to testify.
- 13. Complaint to commission, how made — Investigations, how conducted — Complaints by State railroad commissions.
- 14. Report of commission, how made — Report, how published.
- 15. Commission to notify carrier of violations of law — Compliance of carrier with notice, effect of.
- 16. Disobedience by carrier of order of commission, how punished — Power of federal court to issue injunction — Mandamus — Attachment — *Per diem* penalty not to exceed \$500 — Appeal to U. S. Supreme Court — Trial by jury — Jury may be waived — Supplemented — Act of February 11, 1903 — When United States a party, suit entitled to immediate hearing — Appeal to U. S. Supreme Court — U. S. Circuit Courts always open.
- 17. Procedure before interstate commerce commission.
- 18. Salary of commission — Fees and expenses.
- 19. Sessions of commission, where held.
- 20. Carriers must make annual reports to commission — Contents of reports — Uniformity of methods of keeping accounts — Supplemented — Act of March 3, 1901 — Carrier must make monthly reports of accidents.
- 21. Commission to make annual reports to Congress.

SEC. 22. Free or reduced rates — Excursions — Mileage —
Commutation rates — Remedies cumulative not ex-
clusive — 5,000-mile tickets — Penalties.

23. Remedy by mandamus to move traffic or furnish cars.

*Be it enacted by the Senate and House of Represen-
tatives of the United States of America in Congress
assembled:*

Section 1. **Interstate Commerce Defined.**— That the pro-
visions of this act shall apply to any common carrier
or carriers engaged in the transportation of passengers
or property wholly by railroad, or partly by railroad
and partly by water when both are used, under a com-
mon control, management, or arrangement, for a con-
tinuous carriage or shipment, from one State or Ter-
ritory of the United States, or the District of
Columbia, to any other State or Territory of the
United States, or the District of Columbia, or from
any place in the United States to an adjacent for-
eign country, or from any place in the United
States through a foreign country to any other place
in the United States, and also to the transporta-
tion in like manner of property shipped from any place
in the United States to a foreign country and carried
from such place to a port of transshipment, or shipped
from a foreign country to any place in the United
States and carried to such place from a port of entry
either in the United States or an adjacent foreign
country: *Provided, however,* That the provisions of this
act shall not apply to the transportation of passengers
or property, or to the receiving, delivering, storage, or
handling of property, wholly within one State, and not
shipped to or from a foreign country from or to any
State or Territory as aforesaid.

Definitions — Railroad — Transportation.— The term
“ railroad ” as used in this act shall include all

bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Charges Must be Reasonable.— All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Object and Scope of Section 1.— Section 1 defines the persons and corporations to which the act applies, and which are bound by its provisions. It will be observed that the statute was framed to embrace only carriers and shippers engaged in interstate commerce. It has no application to domestic commerce, and so declares expressly. Any provision of an act of Congress assuming to regulate domestic commerce, that is commerce conducted wholly within the borders of a State, would be void, as the power conferred upon Congress by the Constitution in this regard is confined to commerce among the several States, and with foreign nations. The statute relates wholly to the rights, liabilities, and duties of carriers of passengers or property, and the rights and duties of shippers. It does not relate to persons or corporations engaged in the manufacture, production, and sale of commodities.

The Interstate Commerce Act has no relation to trusts or combinations in restraint of trade and commerce, in the manufacture, production, and sale of merchandise. Its provisions relate only to combinations in restraint of trade and commerce, when engaged in by carriers, with respect to rate making and pooling of freight charges, or contracts or arrangement among carriers of connecting and competing lines, which operate to

stifle competition or to discriminate against shippers or localities by giving undue preferences to some over others.

Congress in 1890 supplemented the Interstate Commerce Act by the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies" familiarly known as the Sherman Anti-trust Law. (See *post*, page 247.) This latter statute is of universal application. It affects not only carriers but embraces "every contract" or combination in restraint of trade or commerce among the several States.

The Sherman Act has been construed by the Supreme Court of the United States to embrace carriers and corporations operating lines of railroads, as well as persons and corporations engaged in the manufacture, production, and sale of commodities.

The provisions of the Interstate Commerce Act may now be read and studied in connection with the Sherman Act.

Object of the Act.— The primary object of the Interstate Commerce Act was to place all shippers and all localities upon an equality, and to compel the carrier to treat all alike, and to make its charges and tariffs for the carriage of persons and property uniform for like service performed under similar circumstances and conditions. It also requires all carriers operating connecting lines to be treated impartially with respect to facilities for interchange of traffic, and forbids discrimination in rates between connecting lines. It requires that all charges made by the carrier for any service shall be just and reasonable.

This provision of the act is mandatory. Unreasonable charges are not only forbidden, but are declared to be unlawful and subject the guilty parties to liabilities and penalties, both civil and criminal.

In this connection Judge BROWN, in *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263, reviewed the purpose and object sought to be accomplished by the passage of the act. He observes in substance that prior to the passage of the act a number of States had passed laws to secure the public against unjust and unreasonable discriminations. The inefficiency of the laws which could not operate as to commerce passing beyond the State line, the impossibility of securing uniformity of State

action, and the evils which grew up under a policy of unrestricted competition suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the States. The evils sought to be remedied by the act consisted principally in inequality of rates, refusal of carriers to furnish equal facilities to shippers, and connecting competing carriers. These evils were practiced and tolerated to promote individual interests, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line under like conditions, and to abolish combinations for pooling freights. The statute was not designed to prevent competition between different roads or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage. This is authorized and is lawful where the reduction does not operate as an unjust discrimination against others using the road. See *post*, section 22.

The object of Congress in enacting the Interstate Commerce Act was to facilitate interstate commerce and restrict the arbitrary power of the common carrier. The intention of the act was not to deprive the shipper of any right which he might have invoked in any court prior to the passage of the act. The intention clearly was to facilitate the shipper in securing such right by creating new and special remedies for that purpose. These new remedies were intended to supplement and not to supplant the remedies which existed before the act was passed. Section 22 expressly declares these remedies to be cumulative and not exclusive, and declares broadly that nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies. *Tift v. Southern*

Railroad, 123 Fed. Rep. 789 (July, 1903, Circ. Ct. So. Dist. Ga.).

The Supreme Court has also declared the object of the supplementary legislation embraced in the Elkins Act of February 19, 1903, to be to furnish a remedy which should operate retrospectively and that its provisions were applicable to actions or proceedings pending when the act was passed. *Missouri Pacific v. United States*, 189 U. S. 274.

Common-law Rule.—Prior to the passage of the Interstate Commerce Act railway traffic in the United States was governed by the principles of the common law applicable to common carriers “which,” says Justice BROWN, “demanded little more than that they should carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service, though the weight of authority in this country was in favor of an equality of charge to all persons for similar services.” *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263.

The Interstate Commerce Act created no new right in the shipper. At common law a carrier was bound to receive and transport all goods offered on receiving reasonable compensation for such carriage. The carrier at common law could not lawfully enforce unreasonable charges. The difference in the obligation of a common carrier and an individual, is that the former has undertaken a duty to the public. That duty imposed upon him the obligation to carry for all to the extent of his capacity, without unjust or unreasonable discrimination either in charges or in the facilities for actual transportation. *Tift v. Southern Railroad*, 123 Fed. Rep. 789 (July, 1903, Dist. Ct. So. Dist. Ga.).

The court in support of the proposition above set forth cited *Atcheson v. Denver Railroad*, 110 U. S. 667; *Interstate Com. Co. v. Cincinnati Railroad*, 167 U. S. 479.

This common-law obligation of the carrier is even stronger upon carriers who receive valuable franchises from the public. The universal reliance of the public on the instrumentalities of modern commerce renders their operation indispensable to the

existence of modern social life. The act of Congress in so far as it prohibits and forbids the carrier from imposing unjust and unreasonable rates is an express adoption of the rules of the common law in this regard. By embodying this common-law right in the statute, Congress created no new right in the shipper, but provided for him a remedy in the Federal courts. *Ib.*

Power to Regulate — Power to Prohibit — Term "Regulate."

— The power conferred by the Constitution upon Congress is defined as power to "regulate" commerce among the States and with foreign nations. In construing the word "regulate" in regard to the extent and limitations of the power thus conferred, the question has been raised as to whether Congress may prohibit any branch of interstate commerce and whether the power to "regulate" authorizes power to prohibit. The Embargo and Non-intercourse acts of 1808 and 1809 grew out of the encroachments sanctioned or allowed by England upon the rights of American commerce which became open and hostile, and finally culminated in the second war with England in 1812. These statutes not only assumed to regulate commerce, but to prohibit it in certain respects. The Supreme Court of the United States never questioned the power of Congress to pass these laws, nor was it adjudged that Congress exceeded its powers in enacting them. *Schooner Paulina's Cargo v. United States*, 7 Cranch, 52; *Sloop Active v. United States*, 7 Cranch, 100.

The power of Congress to prohibit commerce was raised specifically in the lottery cases. (*Champion v. Ames* No. 2, 188 U. S. 321.) Congress passed an act (approved March 2, 1895, 28 Stat. L. 963, chap. 191) making it a penal offense to traffic in lottery tickets. The penalties imposed by the statute operated as a prohibition against such traffic. Defendant was indicted for a violation of the statute. He pleaded as a bar to the indictment the illegality of the statute, and claimed, among other things, that while Congress was given power "to regulate" commerce, no authority existed giving it power to prohibit commerce. Counsel argued, therefore, that the lottery statute was unconstitutional and void. The court sustained the law, and held in considering the validity of the statute the court must con-

sider the character of the traffic affected, and must determine whether it might constitute a nuisance or affect public health or morality. The court observed that there was no provision of the Constitution under which one could sustain a claim to engage in business which will result in harm to public morals. Congress, under the power to "regulate" commerce, may provide that it shall not be polluted. The liberty protected by the Constitution, embraces the right to be free in the enjoyment of one's faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper. But it is no part of one's liberty that he shall be permitted to introduce into commerce an element that will be confessedly injurious to public morals, such as trafficking in lottery tickets. *The Lottery Cases*, 188 U. S. 321.

As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress for the purpose of guarding the people of the United States against the "wide spread pestilence of lotteries," and to protect the commerce which protects all the States, may prohibit the carrying of lottery tickets from one State to another. In so far as such legislation may operate to prohibit such traffic it was declared to be valid and constitutional. *Ib.*

Commerce Defined.—In construing the scope and extent of the commerce clause of the Constitution, the word "commerce" is defined to embrace navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. *Lottery Cases*, 188 U. S. 321.

Interstate commerce includes not only the exchange and transportation of commodities or visible tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Rattan v. Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

Commerce — Lottery Tickets.— Lottery tickets have commercial value, even if the holder of such a ticket does not draw a prize; the ticket before the drawing has a money value in the market among those who choose to sell or buy it. Such tickets

are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State at least by express companies, or by independent carriers, is a regulation of commerce among the several States. *Lottery Cases*, 188 U. S. 321.

Interstate Commerce — Domestic Commerce.—The power conferred by the Constitution on Congress to regulate commerce is limited to commerce among the States and with foreign nations. Congress has no power over domestic commerce, or commerce conducted wholly within the borders of a State. Questions frequently arise with respect to what constitutes interstate commerce. To what extent can a State legislate with regard to instrumentalities of commerce, and property within it belonging to corporations engaged in interstate commerce; which corporations derive not only their existence, but their powers and franchises, not from any Federal statute, but from the laws of the State. These questions involve the validity of State laws imposing a tax on corporate property within the State used in interstate commerce. It is well settled that a State has no power to tax interstate commerce any more than Congress can legislate with regard to domestic commerce. Can a State impose a tax on property therein when such property is used by a State corporation engaged in interstate commerce? Can a State impose a tax on instrumentalities of interstate commerce within the confines of the State? The authorities on this point will be found more fully discussed in chapter I, relating to constitutional provisions bearing on the subject. See *ante*, pp. 21-26.

Many statutes have created railroad commissions and clothed them with power over domestic commerce, and imposed upon them duties in many respects like those which Congress has conferred upon the Interstate Commerce Commission. How far may these powers be exercised by State Railroad Commissions without conflicting with the powers exercised by the Interstate Commerce Commission? The authorities referred to below bear upon these questions.

Jim Crow Cars — Not Interstate Commerce.—A statute of Alabama (approved March 2, 1888) requiring carriers within the State (except street railroad companies) to provide sepa-

rate accommodations for white and colored passengers, which was construed by the Supreme Court of Alabama to apply solely to commerce within the State, is not a regulation of interstate commerce. See *ante*, page 9.

The construction of such a statute by the Supreme Court of Alabama is conclusive in the United States Supreme Court. *Louisville Railway v. Mississippi*, 133 U. S. 587.

Interstate Commerce — What Constitutes.— Oranges grown in Florida were shipped from the groves to a point within the State for the purpose of being immediately re-shipped and forwarded to their destination in other States. It was *held* that the shipments to the points in Florida, in transit, to points without the State was interstate commerce, and that such traffic was governed by the Interstate Commerce Act. That the rates prescribed by the Florida Railroad Commission, to wit, fifteen cents per box to the Florida points, were not binding on the carrier who prescribed the rate of twenty-five cents per box, and that in absence of proof that the rate charged by the carrier was not unreasonable it was a legal charge, and that tariff regulations prescribed by the Florida commission could not be enforced unless the carriers' rates were shown to be exorbitant or unreasonable. *Cutting v. Florida Railroad*, 46 Fed. Rep. 641 (June, 1891, Circ. Ct. No. Dist. Fla.)

Interstate Commerce — Eminent Domain — Bridges.— Congress may create corporations as appropriate means of executing the powers of government for promoting commerce among the States. And when it becomes necessary for the accomplishment of any object within the authority of Congress to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the State in which the lands lie. Congress may, if it sees fit, recognize and approve bridges erected by authority of two States across navigable waters between them, or it may, at its discretion, use its sovereign powers, directly or through a corporation for that object, to construct bridges for the accommodation of interstate commerce by land, as it may to improve navigation of rivers for the convenience of interstate com-

merce by water. *Luxton v. North River Bridge Co.*, 153 U. S. 525.

Congress, by act approved July 11, 1890, incorporated The North River Bridge Company, and authorized it to construct a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge as a military and post road. *Held valid. Ib.*

State Railroad, when Bound by Act — Common Control.—

When a railroad operating a line wholly within the State elects to enter into the carriage of interstate freight by participating in through rates and charges, and agreeing, in consideration thereof, to transport freight from other States over its line on through bills of lading, it becomes a party to an arrangement for continuous carriage or shipment from one State to another and is bound by the provisions of the Interstate Commerce Act. *Cincinnati Railway v. Interstate Com. Co.*, 162 U. S. 184.

The Georgia Railroad Company, operating a line extending from Atlanta easterly to Augusta, 171 miles, carried goods in connection with roads operating in other States, shipped from Cincinnati, Ohio, to Atlanta, Augusta, and intermediate points. The rate charged on through freight from Cincinnati was \$1.07 per hundred, whether shipped to Atlanta or Augusta. On goods shipped from Cincinnati to Social Circle, a point on the Georgia road 52 miles east of Atlanta and 119 miles west of Augusta, the rate charged on like freight was \$1.37 per hundred. The distance from Cincinnati to Atlanta was 474 miles, and to Augusta, 645. To Social Circle the distance from Cincinnati was 526 miles. The rate to Social Circle was made by adding to the through rate the local rate of thirty cents from Atlanta to Social Circle. Upon complaint the Commission made an order to the several roads directing them to desist from making any greater charge on like freight from Cincinnati to Social Circle than was charged from Cincinnati to Augusta. The order was disobeyed. In an action to enforce it the bill was dismissed, and this judgment was reversed in the Court of Appeals and the reversal was sustained in the Supreme Court.

The court *held* that the Georgia railroad was not justified in

adding the local rate to the through rate on goods shipped over its line on through bills of lading. That when goods are shipped from one State to another on through bills of lading, and are received by a State carrier, who participates in the rate and in the arrangement, the State carrier subjects itself to the provisions of the Interstate Commerce Act, and upon the evidence the Commission was justified in directing it to desist from charging more for a shorter than for a longer distance over the same line, in the same direction. *Ib.*

A shipper may invoke the provisions of the Interstate Commerce Act against discrimination in interstate shipments against a railway operating a belt line around a city, the railroad so operated being wholly within the limits of the State of Indiana, if it receives shipments over connecting lines from other States on through bills of lading. Such shipments constitute interstate commerce. *Interstate Stock Yards v. Indianapolis Railway*, 99 Fed. Rep. 472.

Power of Congress and the States.— The power to regulate commerce among the States and with foreign nations conferred by the Constitution upon Congress is supreme and exclusive. But this power must be exercised through the medium of Federal legislation. When Congress has legislated upon any particular branch of the subject such legislation is controlling. But until Congress legislates the local law or the statutes of a State upon a subject which may directly or indirectly affect a branch of interstate commerce not covered by a Federal statute will prevail, and will be enforced. *Pennsylvania Railroad v. Hughes*, 191 U. S. 477; *Missouri Kansas Railroad v. Haber*, 169 U. S. 613; *Smith v. Alabama*, 124 U. S. 465; *Cleveland Railroad v. Illinois*, 177 U. S. 514; *Chicago Railroad v. Solan*, 169 U. S. 133.

Judge HARLAN, in the *Haber* case, states the rule very clearly. He says: "Even if the subject of State regulations be one that may be taken under the exclusive control of Congress and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes." *Missouri Kansas Railroad v. Haber*, 169 U. S. 613.

In the case of *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, the carrier claimed the right to exempt itself from liability as a common carrier, or to limit its liability so as to conform to the terms and conditions prescribed in its printed bill of lading. There was no statute in Pennsylvania forbidding a carrier to assume to exempt itself from liability by clauses and conditions inserted in bills of lading issued by it. The Pennsylvania courts, however, held, in their construction of the common-law rule governing common carriers that the latter could not exempt themselves or limit their liability in that manner. Such was declared by the Supreme Court of Pennsylvania to be the law in that State, and was the policy of the law of that Commonwealth.

The action was against the carrier to recover the value of goods shipped. Upon the trial the court refused to hold that the liability of the carrier was limited to the amount designated in the bill of lading, and allowed the jury to find the value of the property, and held that the decisions of the courts of Pennsylvania, forbidding the carrier to assume to limit its liability in the manner claimed by it, was binding and operative, although the local law might affect directly or indirectly interstate commerce. Defendant appealed and the judgment was affirmed by the Supreme Court of Pennsylvania, 202 Pa. St. 222. Defendant sued out a writ of error to the Supreme Court of the United States, which affirmed the judgment.

The court held that the law of Pennsylvania, as interpreted by its courts, though it might affect in some way interstate commerce, was nevertheless binding until a Federal law was enacted with respect to the power or right of a carrier to limit its liability in the manner claimed by it. *Pennsylvania Railroad v. Hughes*, 191 U. S. 477.

Reasonable Rates — Power of State to Prescribe.— A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. A corporation, after

accepting a public franchise, cannot construct a public highway simply for its own benefit, without regard to the rights of the public. *Smyth v. Ames*, 169 U. S. 466.

A corporation, which accepts a public franchise to perform public services, and those financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. *Ib.*

A railroad corporation is a person within the meaning of the Fourteenth Amendment, declaring that no person shall be deprived of property without due process of law. A State, therefore, cannot by statute establish rates of transportation within its borders, which rate will not admit of the carrier earning such compensation, as under all the circumstances is just to it and to the public, and thus deprive it of its property without due process of law, and deny to it the equal protection of the laws.

The State of Nebraska passed a statute (Laws 1893, chap. 24, in effect August 1, 1894), entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." The State authorities, under the statute, promulgated a schedule of tariffs and rates to be charged within the State, which the railroads claimed were too low to enable the carriers to receive a fair and reasonable return on the capital invested, and that the statute operated to deprive the carriers of their property without due process of law, and deprived them of the equal protection of the laws. The courts sustained the contention of the carriers and granted an injunction to restrain the enforcement of the Nebraska rates fixed by its officers under the statute, which was affirmed.

Judge HARLAN said, among other things: "That the basis of calculations as to reasonableness of rates by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, amount expended in permanent

improvements, amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case." The carrier is entitled to ask a fair return upon the value of its capital; and the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by the carrier are reasonably worth. *Ib.*

The Union Pacific railroad is incorporated under a Federal statute (Act of July 1, 1862, chap. 120). One provision of this statute (section 18) provides that "Whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." *Held*, that Congress intended thereby to leave the question of the rates for local business, wholly within a State, to the control of the respective States through which the road might pass, with power reserved by Congress to intervene under certain circumstances and fix rates that the corporation could reasonably charge. The fact that the carrier was incorporated under a Federal statute did not preclude the State legislature from prescribing rates within its territory until Congress exercised its power to fix rates as provided by the act. *Ib.*

Remedy of Carrier against State Commission — Injunction.—

The remedy of a railroad company against a State Railroad Commission to prevent such commission from enforcing rates established by it on interstate commerce is by injunction. *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617.

A State, through its Railroad Commission, cannot fix rates to be charged by a carrier for transporting persons or property

between points within such State, when it appears that the property carried was billed through to the point of destination, and was carried part of the distance through another State or territory, and subsequently brought to the place of destination within the same State. *Ib.*

Goods were shipped from Fort Smith, Ark., to Grannis, Ark., over defendant's road, by way of Spiro, in the Indian Territory. The freight charged was in excess of the rate fixed by the Railroad Commission of Arkansas for goods shipped from Fort Smith to Grannis. *Held*, that as the carrier transported the goods part of the distance through Indian Territory, the transaction, though the shipment was between points in Arkansas, was nevertheless interstate commerce, and was not subject to the rates fixed by the Railroad Commission of Arkansas. *Case of Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, relating to *taxation* on freight distinguished. *Ib.*

Domestic Commerce — Right of State to Prescribe Joint Rates over Independent Lines.— A State Railroad Commission, so far as regards domestic commerce, may control and supervise freight rates under joint traffic agreements between two or more independent railroads, as if such rates and charges related to transportation over a single line of road. When the rates prescribed by the State Commission are not unreasonable they can be lawfully enforced. *Minneapolis R. Co. v. Minnesota*, 186 U. S. 257.

Interstate Commerce — Live Stock — When State Statute as to Will be Upheld.— The transportation of live stock from State to State is interstate commerce, and any specific rule or regulation with respect to such transportation which Congress may lawfully prescribe or authorize, and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. When the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect to such matters and covering the same ground will cease to have any force, whether formally abrogated or not, and such rules or regulations as Congress may lawfully prescribe or

authorize will alone control. *Reid v. Colorado*, 187 U. S. 137, citing *Gibbons v. Ogden*, 9 Wheat. 1; *Morgan v. Louisiana*, 118 U. S. 455; *Hennington v. Georgia*, 163 U. S. 299; *New York, New Haven R. Co. v. New York*, 165 U. S. 628; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613; *Ramussen v. Idaho*, 181 U. S. 198.

The power which the State might thus exercise in this way, with respect to the treatment and inspection of live stock, may be superseded until national control is abandoned and the subject be thereby left under the police power of the States. *Ib.*

Congress, by the passage of the Animal Industry Act (Act May 29, 1884, 23 Stat. L., chap. 60), did not cover the entire subject of the transportation or shipment of diseased live-stock, known to be affected with any contagious, infectious, or communicable disease from one State to another. *Ib.*

Accordingly held that a statute of Colorado (Approved March 21, 1885), which prescribes methods to protect domestic animals of Colorado from coming in contact with live stock coming into its territory within certain dates, and authorizing the exercise of its police power to protect the property of its people from injury or disease, and which does not forbid the introduction into the State of *all* live stock, if not unreasonable, and is not shown to be in conflict with any law of Congress, is not necessarily void. *Ib.*

Plaintiff in error was indicted, under the Colorado statute, for failure to procure a certificate from the Colorado authorities. On the trial he put in evidence a certificate obtained from Arthur C. Hart, assistant inspector Bureau of Animal Industry, certifying that he had carefully inspected the cattle in question at Hereford, Tex., and found them "free from Texas or splenic fever infection (*Brucella abortus*), or any other infectious or contagious disease, and that no Texas fever infection is known to exist where they have been kept, or on the trail over which they have passed. The certificate at bottom contained these words: "Animals which have been inspected and certified by the inspector of the U. S. Bureau of Animal Industry, and are free from disease, have the right to go into any State, and be sold for any purpose, without

further inspection or the exaction of fees." On the trial one of defendant's witnesses testified that the cattle had been inspected by a Colorado inspector against his will, and the reason he did not get a certificate from the State Board of Colorado "was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant of law." There was no evidence given to show the amount of these fees, or the unreasonableness of the Colorado statute in its operation. *Held*, that in the absence of evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State of Colorado to protect its domestic animals, and it appearing that the Colorado statute was not, on its face, in conflict in any wise with the act of Congress (the Animal Industry Act), the statute of Colorado must be upheld and the conviction under it affirmed. *Ib.*

Public Rates not Affected by State Regulations.—A State cannot legislate upon subjects relating to interstate commerce, concerning which Congress has legislated. A statute of a State imposing a penalty on the carrier for failure to deliver goods on tender of the rate named in the bill of lading has no application to goods shipped from another State, and if the State statute conflicts with the act of Congress the latter alone is operative. *Gulf Railway v. Hefley*, 158 U. S. 98.

The Legislature of Texas passed a law (approved March 6, 1882) making it unlawful for a carrier to charge more for freight than the amount designated in the bill of lading, and directing the carrier to deliver freight upon payment of the rate so designated, and for refusal to do so upon tender, making the carrier liable in damages in a sum equal to the amount of the freight for each day's detention.

The Interstate Commerce Act (section 6) provides that carriers shall print, publish, and post at each station schedules of fares and rates and joint rates between connecting carriers. There was shipped to plaintiff at Cameron, Tex., from St. Louis, Mo., a carload of furniture, billed at sixty-nine cents per hundred. The printed tariff sheets of the carrier at Cameron designated the rate at eighty-four cents per hundred. Before the

shipment this public rate had been reduced to sixty-nine cents, but the new schedule of rates, showing this reduction, had not reached the agent at Cameron when the furniture arrived there. The shipper tendered the freight designated in the bill of lading, amounting to \$82.80. The carrier's agent detained the goods for one day, awaiting instructions from his superiors, and the carrier, under the Texas statute, became liable for \$82.80, which plaintiff sued for and recovered. On writ of error the judgment was reversed, on the ground that the Texas statute was inoperative, being in conflict with the provisions of the Interstate Commerce Act, which contained no such provision. *Ib.*

In the absence of the Federal statute the Texas statute might be upheld as a police regulation, but as Congress had legislated upon the subject, and the State law being in conflict with the Federal statute, the former must yield. *Ib.*

Stoppage of Trains — When a Regulation of Interstate Commerce.— A statute of Illinois (act approved March 31, 1874) provided that "Every railroad corporation shall cause its passenger trains to stop upon arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety; Provided all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety."

The State's attorney petitioned United States Circuit Court for a writ of *mandamus* to compel defendant to stop an express train, known as the "Knickerbocker Special," at Hillsboro, the county seat of Montgomery county. Defendant claimed that it furnished four regular passenger trains each way a day, which passed through and stopped at Hillsboro; and that the "Knickerbocker" was a through express, carrying interstate transportation between St. Louis and New York, and that by stopping at Hillsboro its schedule connections with other roads would be interfered with. Plaintiff demurred to the answer and the demurrer was sustained. On writ of error *held*, that the statute of Illinois, so far as the interstate transportation was con-

cerned, imposed a direct burden on interstate commerce, and was an attempt by the State to regulate interstate commerce, which the State had no power to do. *Cleveland R. Co. v. Illinois*, 177 U. S. 514.

The court declared that the distinction between the Illinois statute and a statute making regulations requiring passenger trains to stop at railroad crossings and draw-bridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring tracks to be fenced, and a bell and whistle to be attached, signal lights to be carried at night and tariff and time-tables to be posted at proper places, and similar requirements contributing to the safety, comfort, and convenience of patrons is too obvious to require discussion. *Ib.* Citing *Railroad Commission Cases*, 116 U. S. 307.

A statute of Illinois (Laws 1889, chap. 114, § 88) declared that railroad corporation should stop trains at places at which it advertised to stop, long enough to take on and let off passengers, "provided all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety."

Defendant formerly ran all its passenger trains to and from its depot and station in Cairo, the county seat of Alexander county, and made it its southern terminus. It afterward, jointly with the Chicago, St. Louis and New Orleans road, constructed a bridge across the Ohio, over which it was connected with the latter road, and put on a daily fast mail to run from Chicago to New Orleans, carrying also passengers. The bridge crossed the river two and a half miles north of its old station. Its fast mail ran through from Chicago to New Orleans, crossed the Ohio at Bridge Junction, three and one-half miles north of the station, and did not stop at its old depot in Cairo. Six regular passenger trains were run daily to the station in Cairo, giving adequate accommodations for passengers to and from Cairo. The court, under the statute, granted a *mandamus* compelling defendant to cause its south-bound fast mail and all its other passenger trains to be run down to its passenger station south of Bridge Junction to stop and take on and leave off passengers. Affirmed by Supreme Court of Illinois. On writ of error to United States Supreme Court reversed.

The Supreme Court held, under all the circumstances, that the requirement was an unconstitutional hindrance and obstruction of interstate commerce. It delayed transportation of through passengers and mails, by turning aside from the direct interstate route and running to a station three miles and a half away, and back again to the same point, when defendant furnished other ample accommodations for Cairo passengers. *Illinois Railway v. Illinois*, 163 U. S. 142.

A statute of Ohio (Rev. Stat., § 3320. Act approved April 13, 1889) provided that "each company shall cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers." The statute provided as a penalty for a violation of the act a forfeiture of not more than \$100 nor less than \$25, to be recovered in an action in the name of the State. Defendant company was sued for a violation of the statute in failing to stop its trains at West Cleveland, a municipal corporation, having more than 3,000 inhabitants on a secular day, and judgment was recovered against it, which was affirmed by the Supreme Court of Ohio. Defendant, by writ of error, came into the United States Supreme Court and claimed that the power to regulate interstate commerce is vested in Congress, and that the Ohio statute, in its application to trains engaged in such commerce, was repugnant to the Federal Constitution and void. The carrier insisted that it had a right to start its trains at any point in one State and pass into and through another State, without taking up or setting down passengers within the limits of the latter State. Defendant was incorporated in Ohio, New York, Pennsylvania, Indiana, Michigan, and Illinois.

The carrier operated each day an express, fast mail, and one other train easterly through West Cleveland, carrying through passengers between New York and Chicago, and four through trains eastwardly through West Cleveland, carrying passengers from Chicago to New York, none of which stopped at West Cleveland. Only one train a day, each way, stopped at West Cleveland. These trains did not carry through passengers. There were thirteen villages in Ohio containing 3,000 inhabit-

ants, through which such trains passed; average time required to stop, three minutes. The court affirmed the judgment and sustained the validity of the Ohio statute. The court, in its opinion, observed in part, that to hold that the Legislature of Ohio had no power in the absence of an act of Congress to pass the statute in question would mean that the carrier could manage its affairs without taking into consideration the interests of the general public, and its directors could so regulate the running of interstate trains as to build up cities and towns at the ends of its lines, or at favored points, and by that means destroy or retard the growth and prosperity of intervening points. It would mean that a State which had granted a charter to a carrier had no power to prevent such carrier from running all its trains through such State without stopping at any city within its limits. The carrier could thus prevent people within such State from engaging in interstate commerce and from using its interstate trains at all or only at such points as the carrier might choose to designate. That the statute of Ohio was in aid of interstate commerce, not hostile to it, and by the statute in question the Legislature did nothing more than regulate the use of a public highway, established and maintained under its authority in such a way as to reasonably promote public convenience. *Lake Shore v. Ohio*, 173 U. S. 285, distinguishing *Hall v. De Cuir*, 95 U. S. 485; *Wabash v. Illinois*, 118 U. S. 556; *Illinois Central v. Illinois*, 163 U. S. 142.

Stoppage of Sunday Trains.— A statute of Georgia (Code 1882, § 4578), forbade the running of freight trains on any railroad in the State on Sunday, and declared a violation of the statute to be a misdemeanor. Defendant was indicted and set up the defense that he was operating a freight train engaged in interstate commerce, and that the Georgia statute was a regulation by the State Legislature affecting interstate commerce and was, therefore, unconstitutional and void. Defendant was convicted, his conviction was affirmed by the Supreme Court of Georgia, and on writ of error the United States Supreme Court affirmed the judgment. *Hennington v. Georgia*, 163 U. S. 299.

The court *held*, that had the statute related only to trains transporting domestic freight within the State of Georgia it

could not be regarded otherwise than as an ordinary police regulation, under its authority to protect the health and morals and to promote the welfare of its people. It was not intended as an enactment to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. While in a limited degree the statute may affect interstate commerce it is not necessarily an intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but an ordinary police regulation which the State had power to enact. *Ib.*

Speed of Trains — When State May Regulate.— A city, when authorized by the Legislature, may regulate the speed of railway trains within the city limits. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the State at least until Congress shall take action in the matter. *Erb v. Morash*, 177 U. S. 584, citing *Railroad Co. v. Richmond*, 96 U. S. 521; *Cleveland R. Co. v. Illinois*, 177 U. S. 514.

Express Companies — When not Subject to the Act.— An express company, independently organized, doing business on its own account and for its own benefit, independent of any connection with the carrier, is not subject to the provisions of the Interstate Commerce Act. To render an express company liable to indictment for a violation of the provisions of the act the indictment must aver that the defendant carries on the express business in connection with the railroad or a combination of railroads as a branch or department of their general freight traffic. In that case the express company would be the mere agent of the carrier, and liable to indictment for a violation of the penal provisions of the act. *United States v. Mossman*, 42 Fed. Rep. 448 (May, 1890, Dist. Ct. East. Dist. Mo.).

Damages for Unreasonable Charges.— The act declares that all charges by the carrier must be reasonable and just, and every unreasonable and unjust charge is declared to be unlawful. A shipper who suffers damage by reason of an unlawful charge has a cause of action under section 1. Such an action is not based

on the facts which give a cause of action for unjust and unreasonable discrimination under section 2, where one shipper is charged more than another for a like service. *Kinnavey v. Terminal Railroad Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist., Mo. E. D.) ; *Van Patten v. Chicago Railroad*, 81 Fed. Rep. 545 (June, 1897, Cir. Ct. No. Dist. Iowa).

In an action under section 1 for damages for an unlawful charge the published rate is *prima facie* evidence as a standard of comparison whether or not the charge complained of is unreasonable. The complaint in such an action must allege either that no schedule of rates was published by defendant, or that the rate charged plaintiff was in excess of such published rate. The published rate is the only legal rate the carrier can charge, and any violation of them subjects the carrier to the penalties of the act. A compliance with the published rate is defense to such an action. *Ib.*

See also as to published rates *Railway Co. v. Hefley*, 158 U. S. 158.

“Common Control.”— Where carriers agree upon a schedule of joint rates, which are published pursuant to the provisions of the Interstate Commerce Act, in which each of the defendants participates, and they agree among themselves as to their *pro rata* share of such rates, the transaction constitutes “a common control, management, or arrangement for a continuous carriage or shipment” within the meaning of the act, and each participant became thereby subject to the provisions of the act. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

Successors in Interest Bound by Order.— An order made by the Interstate Commission directing a corporation carrier to cease from giving drawbacks, rebates, or unjust charges discriminating against a shipper, cannot be defeated by the dissolution or re-organization of the corporation. The corporations succeeding to the interests of the original corporation and taking over its assets, property, and franchises will be bound by the order made against the predecessor in like manner as if the order had been made against its successors. *Interstate Com. Co. v. West-*

ern Railroad, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

Receiver Bound by Order against Corporation.—An order made by the Interstate Commerce Commission with regard to rates is binding upon the successors of the corporation and upon the receiver of such a corporation appointed by the court. If the order of the Commission was void for want of power, (an order fixing rates which the Commission cannot make) a receiver of the corporation thereafter appointed is not bound to obey it. Nor can the court grant relief under such an order upon the theory that the petition seeking relief against a receiver is practically an application to the court to regulate the conduct of the receiver as an officer of the court. Such an order cannot be enforced on the ground that it concerns only the petitioners and the receiver who practically represents the court. *Ib.*

Receivers and Trustees Liable.—Congress by the Elkins Act, approved February 19, 1903, has expressly extended the liabilities and penalties of corporations for violations of the Interstate Commerce Act to directors and officers of the corporation, and also to any receiver, trustee, lessee, agent, or person acting for or employed by such corporation. Such persons are declared to be criminally liable under the statute for acts done by them in violation of its provisions, and such acts are declared to be the acts of the corporation.

Reasonableness of Rates a Judicial Question.—Whether rates of transportation fixed by the carrier are reasonable or not is a judicial question, to be determined upon evidence as to all surrounding facts and circumstances in each case. A statute of Minnesota (approved March 10, 1887, chap. 10) which the Supreme Court of Minnesota held made the rates fixed and published by the Railroad Commission of the State final and conclusive, and not open to judicial inquiry, is in conflict with the constitutional provision which forbids the taking of property without "due process of law." *Chicago Railroad v. Minnesota*, 134 U. S. 418.

The court below granted a writ of *mandamus* to compel the carrier to enforce the rates within the State fixed by the Commission.

In response to the petition for the writ the carrier claimed that the rates fixed by the Commission were unreasonable, and the State court held that the statute fixed the rates, and evidence by the carrier as to whether they were or were not reasonable was immaterial. *Held* error. That the construction of the State court given to the Minnesota statute that the rates fixed under it were final and conclusive operated to deprive the carrier of his property without due process of law, and denied to it the equal protection of the law. *Ib.*

Reasonable Rates — The Element of Risk and Value.— In passing upon the question as to whether rates are reasonable the Interstate Commerce Commission must take into consideration the value of the service and the element of remuneration to the carrier for the additional risk he takes on expensive merchandise as distinguished from cheap goods. If it appears that the Commission took no evidence or did not consider these elements in making its order the court will refuse to enforce it. *Interstate Com. Co. v. Delaware Railroad*, 64 Fed. Rep. 723 (December, 1894, Cir. Ct. No. Dist. N. Y.).

Duty of Carrier—Boycott—Strike Will not Excuse Carrier.— A common carrier in the performance of his duties as such is not excused for failure to discharge them by reason of the fact that a strike has been instituted by employees of a carrier who threaten to boycott any carrier handling cars or facilities of the company on whose road the strike is in progress. *Chicago Railroad v. Burlington Railroad*, 34 Fed. Rep. 481 (March, 1888, Cir. Ct. So. Dist. Iowa).

The duty imposed upon a carrier of interstate commerce will be enforced by a mandatory injunction where the injury resulting from its non-performance is continuing. The plea that if defendant should receive cars from the "boycotted" road its own men would be called out and a strike inaugurated will not excuse compliance with the order of the court. *Ib.*

See also *Beers v. Wabash*, 34 Fed. Rep. 244 (March, 1888, Cir. Ct. No. Dist. Ill.).

§ 2. Unjust Discrimination Defined.—That if any common carrier subject to the provisions of this act shall,

directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Object and Scope of Section 2.— The apparent object of section 2, known as the Anti-rebate Law, was to protect the shipper from being discriminated against by the carrier by forbidding inequality in charges. The primary object of the act is to place all shippers upon an equality. Experience has shown that a carrier, in order to secure business from a rival and divert traffic from a competitor, has influenced large shippers to patronize it, and by way of inducement to offer the shipper substantial advantages by a secret arrangement whereby it carries the goods at less than the published schedule rate. This is frequently accomplished by giving secret rebates and drawbacks which enable the shipper to undersell rivals and competitors and to increase his business to an extent which may, in some instances, ruin competitors.

There have been instances in which the carrier was secretly interested in the business of the shipper. Often carriers of coal are also engaged in mining coal. Officers of the carrying corporation are also officers of the mining corporation. The carrier is also the miner, the mining corporation shipping coal over the road operated by some of its own members as officers of the carrying corporation. The temptation of such shippers to favor themselves at the expense of their rivals is obvious. The carrying company secretly gives rebates and drawbacks

to the mining company shipping coal to the market in which its officers are interested. These advantages in freight rates give the favored shipper an unjust and unfair advantage which enables him to destroy competition and secure a complete monopoly.

These particular evils are sought to be remedied by section 2. The secret rebates, drawbacks, or other devices whereby one shipper is charged less for the same service than another are designated unjust discrimination, which is prohibited and declared to be unlawful. The appropriate remedy under section 2 is an action at law by the shipper to recover the money unjustly exacted and paid by him to the carrier in excess of what was charged or paid by other shippers or competitors for like services under substantially similar circumstances and conditions. The liability for moneys received by the carrier in violation of section 2 is declared by section 8, and the remedy by section 9. It may be recovered by the shipper in an action at law as damages. The shipper may, under section 9, elect to proceed before the Interstate Commerce Commission, but in that case the remedy would not be for money damages, but would be a preventive remedy by a restraining order to be enforced by injunction at the suit of the Commission in a Circuit Court of the United States. Section 10 also creates a criminal liability for a violation of the provisions of the act. But the shipper must elect either to sue at law for damages or proceed before the Commission to secure an injunction. He cannot avail himself of both remedies.

The "discrimination" referred to in section 2 should not be confounded with the discrimination defined in section 4, which relates only to charges whereby the shipper is obliged to pay a greater sum for a short than for a long haul under substantially similar circumstances and conditions.

Similar Provisions Under English Tariff Act.— The English Tariff Act, which formed the basis of the Interstate Commerce Act, contains similar provisions to those contained in section 2. The English courts in construing the British statute have uniformly condemned unjust discrimination of the sort referred

to in section 2. Their courts have observed that it might well be that a carrier, in order to increase its business, might induce a shipper to divert part of his custom from a rival road and give the business to the soliciting carrier, and as an inducement might agree to give the shipper substantial concessions in rates. Such discrimination in favor of large or favored shippers might be profitable to the carrier. Such profit, however, would be wholly at the expense of a rival carrier. But it has been uniformly held that preferences given to particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic to one carrier which otherwise would go to another, are unlawful and cannot be justified on the ground of profit to the carrier allowing them. *Harris v. Cockermouth Railroad*, 3 C. B. (N. S.) 693; *Evershed v. London Railroad*, Law Rep., 2 Q. B. Div. 254.

The *Harris case*, cited above, was decided in January, 1858; the *Evershed case* in February, 1877. The English statutes referred to were the Consolidation Act of 1845 (8 & 9 Vic., chap. 20) and the Railway and Canal Traffic Act of 1854 (17 & 18 Vic., chap. 31). The undue preference clause of the latter act (§ 2) is as follows:

“Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

Unjust Discrimination under the Elkins Act.—The principal aim of the act of February 19, 1903, known as the Elkins Act, *post*, pages 133–138, is to amplify the provisions of section 6, to secure greater publicity in publication of rates and tariffs. The act relates also to rebates, concessions, and discrimination with respect to the transportation of property. In this respect the

Elkins Act amplifies the provisions of section 2. It declares that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff published and filed by such carrier, * * * or whereby any other advantage is given or discrimination is practised." The acts of any officer, agent, or other person acting for or employed by the carrier shall be deemed to be the act of the carrier corporation, as well as the act of the agent or employee. A departure from the published rate, "or any offer to depart therefrom," constitutes an offense under the statute. The published rate is conclusive evidence of the legal rate. The rates bind the carrier publishing them, or any carrier "who participates" in the rate so filed and published. See *post*, page 135.

Parties — Those Receiving Rebates.—The Elkins Act of February 19, 1903, contains a new and important provision as to suits and complaints with respect to rebates. Prior to the passage of the Elkins Act the proper party defendant was the carrier alone who gave the rebate, and afforded the shipper an undue preference and advantage by carrying his goods for a less rate than it charged competitors in the same business. Section 2 of the Elkins Act declares that in actions or suits in the Federal court, or in proceedings before the Interstate Commerce Commission, "it shall be lawful to include as parties, in addition to the carrier, *all persons* interested in or affected by the rate, regulation, or practice under consideration."

It will be observed that under this section the carrier giving the rebate and the shipper who receives it may both be brought before the court or Commission, and all orders, judgments, and decrees "may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Suit for Excessive Charges Existed at Common Law.—The adoption of the Constitution of the United States did not abro-

gate the common law previously existing, and carriers engaged in interstate commerce prior to the passage of the Interstate Commerce Act remained liable to the shipper as at common law, and this liability could be enforced in the State courts prior to the passage of that act. If the plaintiff and defendant were citizens and inhabitants of different States such an action could be maintained in a Circuit Court of the United States. In an action by a shipper for damages for excessive charges on interstate shipments before the adoption of the Commerce Act, the carrier's liability was governed by the common law, and since its adoption the shipper's liability is governed by the common law as modified by the act. *Murray v. Chicago Railroad*, 62 Fed. Rep. 24 (June, 1894, Cir. Ct. No. Dist. Iowa, C. R. D.) ; affirmed, 92 Fed. Rep. 868 (C. C. A. 8th Circuit, February, 1899), 35 C. C. A. 62.

Before the passage of the act a shipper, a citizen of Ohio, sued the carrier, a citizen of Pennsylvania, in the United States Circuit Court, Northern District of Ohio, for damages for charging plaintiff more than defendant charged another shipper for a like service, alleging defendant's liability under the common law. The action was sustained and plaintiff had a verdict. *Hays v. Pennsylvania Railroad*, 12 Fed. Rep. 309 (June, 1882, Cir. Ct. No. Dist. Ohio).

Suits for Excessive Charges under State Statutes.—The evil sought to be remedied by section 2 of the Interstate Commerce Act became so frequent throughout the country before Congress passed the act that a number of the States passed statutes containing provisions similar to those contained in section 2. In many cases the State statutes created a liability against the carrier for treble damages which the shipper was authorized to recover in an action at law. The State of Colorado, among others, passed such an act in 1885. (Laws 1885, chap. 309.) Suit was brought in the Federal court against the Union Pacific railroad for a violation of the statute on shipments of coal. The defense was an alleged contract whereby defendant claimed it was obliged to give the favored shipper and competitor of plaintiff a lower freight rate in case it furnished defendant each year 2,000 tons of coal for transportation, but it was not alleged

that the favored shipper furnished this amount of coal annually, but defendant gave it the rebate. Defendant also pleaded as an excuse for giving the rebate what was alleged to be a claim in tort against the favored shipper for an unliquidated amount. These defenses were overruled, and plaintiff had judgment which was affirmed by the Supreme Court. *Union Pacific v. Goodridge*, 149 U. S. 680.

In sustaining the judgment and affirming the validity of the Colorado statute, Judge BROWN took occasion to observe that it was intended thereby "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power not in the railroad company itself, but in the railroad commissioner to except special cases designated to promote the development of the resources of the State." *Ib.*

Common-Law Remedy not Superseded by Statute.—The remedy of the shipper against the carrier to recover damages for unreasonable and extortionate charges at common law remains until the Legislature or Congress sees fit to enact a statutory remedy. In such case the statutory remedy supersedes the common-law remedy, unless the statute expressly declares such remedy to be cumulative and not exclusive. *Windsor Coal Co. v. Chicago Railroad*, 52 Fed. Rep. 716 (November, 1892, Cir. Ct. West. Dist. Mo.).

The Interstate Commerce Act, however, expressly declares (section 22) that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies." The remedies afforded by the Federal statute, therefore, are cumulative and not exclusive. See *post*, pages 232, 233.

Since the passage of the Interstate Commerce Act all State legislation is thereby superseded as to interstate shipments only. The State statutes remain in full force and virtue in so far as they relate to shipments within the borders of the State. As to such shipments they may be enforced in the State courts, or in the Federal court in case of diversity of citizenship. An action for damages under the Interstate Commerce Act relating

solely to interstate shipments must be brought in the Federal court which has exclusive jurisdiction. See *post*, page 156.

Rebates — Liability of Successor of Corporation.— A successor of a carrying corporation is bound by an order or decree against the original corporation in the same manner and to the same extent as was the original corporation. A lawful order of the Interstate Commerce Commission directing a railroad corporation to cease and desist from giving unjust preferences, rebates, or drawbacks, cannot be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. *Interstate Com. Co. v. Western Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

Criminal Liability—Form of Indictment.— In addition to the civil liability created by the act, a violation of its provisions is made by section 10 of the act a misdemeanor. The penalty prior to the act of February 19, 1903, was by fine or imprisonment or both. The latter act increased the amount of the fine and abolished the provision prescribing imprisonment.

An indictment against a receiver of a railroad for violating the provisions of section 2, after setting forth details of time, place, distance, amount, and kind of freight transported for one shipper, and alleging that the charge to that shipper was for a lower rate than was charged one Henry "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" is sufficient. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

An indictment which charges defendants with receiving certain rates from a shipper at specified times, and that at such times they unlawfully and willfully paid such shipper a certain rebate, is sufficient. *United States v. Morris*, 71 Fed. Rep. 672 (January, 1896, Dist. Ct. No. Dist. Ill.); *United States v. Morris*, 71 Fed. Rep. 672; *United States v. Jenkins*, 71 Fed. Rep. 672.

A railroad company was found guilty of unjust discrimination in violation of section 2 of the act on shipments of oil from Titusville and Oil City, Pa., to New York and points in other States, and was ordered to cease and desist from

continuing such unjust discrimination. Pending proceedings to enforce the order, the company was re-organized and the Western New York and Erie railroads succeeded to its rights, property, and franchises. *Held*, that the successors of the original corporation were bound by the order on the familiar principle that the purchaser of property in litigation *pendente lite* takes it *cum onere*, and is bound by any judgment, order, or decree in the suit. *Interstate Com. Co. v. Western Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

Rebates — Terminal Charges — Cartage. — As a rule, cartage is not a terminal charge or expense, and is not usually assumed by the carrier. Where a carrier furnished free cartage to shippers in one locality and refused to furnish free cartage to shippers in another less distant locality on its line, the cartage will not be regarded as part of the charge of transportation within the meaning of the Interstate Commerce Act, unless the Commission should promulgate an order that carriers should regard cartage when furnished free as a terminal charge, and include it as such in their published schedules. *Interstate Com. Co. v. Detroit Railroad*, 167 U. S. 633.

The purpose of section 2 of the Interstate Commerce Act is to enforce equality between shippers, and it forbids any rebate or other device by which two shippers, over the same line, the same distance under the same circumstances of carriage, are compelled to pay a different price therefor. A carrier operating a competing line, to secure the business of a shipper shipping beer from Cincinnati to Pittsburg, gave the latter a rebate of three and one-half cents per hundred for cartage in hauling the beer from its depot to the shipper's brewery, and gave no such rebate to other shippers who shipped beer from Cincinnati to Pittsburg, is guilty of a misdemeanor under section 2 of the act. *Wight v. United States*, (May, 1897) 167 U. S. 512.

The favored shipper's brewery was on a siding of a competing line known as the "Panhandle" and when taken on the "Panhandle" it was hauled over the siding directly to the brewery without the added expense of cartage. *Held*, that that fact constituted no defense to the charge. The tariff charged by both lines from Cincinnati to Pittsburg was fifteen cents per hundred. Defendant charged all shippers this rate for such service, but it

allowed the favored shipper, whose brewery was on the siding of the "Panhandle," to haul the beer from defendant's depot to his brewery. This cartage cost the shipper three and one-half cents per hundred, and this cost was refunded to him by the carrier. The court held that the net result was that to this particular shipper the charge was eleven and one-half cents per hundred, while the charge to other shippers whose breweries were not upon a railroad siding was fifteen cents per hundred for the same service "under substantially similar circumstances and conditions." *Ib.*

Remedy by Injunction — Elkins Act of February 19, 1903.—

The violation of the provisions of section 2 creates not only a civil and criminal liability, but the acts thereby forbidden may also be corrected in equity by injunction under the supplemental statute of February 19, 1903. Under that act a proceeding may be instituted on behalf of the United States as party plaintiff on motion of the Attorney-General, or at the request of the Interstate Commerce Commission the government may invoke the remedies provided by the act with regard to unlawful discrimination, rebates, or concessions in respect to the transportation of property in interstate or foreign commerce, in a Circuit Court of the United States. Such court may issue a mandatory writ or order to enforce the provisions of the act. Such remedy is expressly declared cumulative, and shall not preclude "the bringing of suit for the recovery of damages by any party injured." The Federal court sitting in equity shall summarily proceed to inquire into the circumstances upon such notice, and in such manner as the court shall direct, and without the formality of pleadings and proceedings applicable to ordinary suits in equity. These provisions of the statute create new remedies, retroactive in their operation, and are applicable, as far as practicable, to pending and undetermined proceedings brought prior to the passage of the amending act, which is declared to be a remedial statute. *Missouri Pacific Railroad v. United States*, 189 U. S. 274; *United States v. Michigan Railroad*, 122 Fed. Rep. 544 (April, 1903, Cir. Ct. U. S. Dist. Ill.).

While the *Missouri Pacific* case was pending in the Supreme Court of the United States, and before the controlling decision

therein had been announced, a similar bill was filed in behalf of the United States under the Elkins Act of February 19, 1903, for an injunction to restrain defendants, the Michigan railroad, from enforcing rates claimed to discriminate among shippers in violation of section 2 of the Interstate Commerce Act. On demurrer defendants contended that the proper remedy was an action for damages by the shipper, and that the Federal court had no jurisdiction in equity to issue an injunction, as the proper remedy was an action at law. The court overruled the demurrer. Actions at law by the shipper are proper, but in many instances are wholly inadequate. *United States v. Michigan Central*, 122 Fed. Rep. 544 (April, 1903, Cir. Ct. No. Dist. Ill.).

In the case cited, the bill averred that defendant practiced unjust discrimination among shippers of grain and packing-house goods, and that this discrimination was carried on to such an extent that each carrier reaching the grain district had eliminated all competitive dealers, leaving only a single favored dealer who purchased all the grain at all stations along the carrier's line. The conditions complained of deprived the growers of grain of the benefit of competition among dealers. Practically the carrier established its own agencies for the purchase of grain, and by devices and discriminations had excluded all other grain purchasers from the field. For such stupendous wrongs an action by the individual shipper is inadequate. The Interstate Commerce Act confers on every citizen engaged in productive industry, the right to have his product transported on equal terms with his competitor. This right is a property right, and effects directly an interest in property. "Nothing short of the prohibitive arm of a Court of Chancery," says Judge GROSSCUP, "can give to the grain growers and producers the free competitive field for the sale of their products to which they are entitled as matter of right under the Interstate Commerce Act." *Ib.*

Pleading — Anti-rebate Suits — Complaint.— In an action by a shipper against a carrier for unjust discrimination in violation of section 2, the complaint or declaration must state facts which show the circumstances and conditions under which

defendant charged plaintiff a given rate for transportation of freight. He may then allege in the language of the act that for like services under substantially similar circumstances and conditions, defendant had given another shipper a less rate, without setting forth the facts which show that the services were alike or rendered under substantially similar circumstances and conditions. *Kinnavey v. Terminal R. Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist. Mo.).

The complaint alleged in substance that defendant, at periods stated, exacted from plaintiff an unreasonable and unjust charge for carrying coal from East St. Louis, Ill., to St. Louis, Mo., and that during same period defendant performed like services for Consolidated Coal Co., a competitor in the transportation of coal under substantially similar circumstances and conditions, and charged and collected from the competitor a less sum therefor than it exacted from plaintiff. Defendant demurred. The court overruled the demurrer. "The pleader" said the court, "alleges the ultimate facts which constitute the right of recovery, and has alleged them in the language of the act which confers the right of action. He has declared that defendant rendered the Consolidated Coal Company for twenty-five cents a ton services like those rendered to him for which it charged thirty cents per ton, and that these services so rendered to the Consolidated Coal Company were performed under circumstances and conditions substantially similar to those attending the services rendered to the plaintiff." The details of these circumstances need not be set forth. They are matters of proof. Nor is it necessary to allege that plaintiff was charged more than the schedule rate to show damage. Plaintiff is entitled to the damage he sustained by reason of the discrimination. *Ib.*

See also authorities cited under sections 8 and 9, *post*, pages 146, 152.

Damages for Unlawful Charges under Section 1.—A shipper who is charged in excess of the published rate, or is charged an unreasonable or unjust rate has a cause of action for damages, under section 1, which declares unjust and unreasonable rates to be unlawful. Such a cause of action must be distinguished from a cause of action for unjust discrimination under

section 2. *Kinnavey v. Terminal R. Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist. Mo.).

See also *Van Patten v. Chicago Railroad*, 81 Fed. Rep. 545 (June, 1897, Cir. Ct. No. Dist. Iowa).

Discrimination — Forwarders — Mixed Carload Rates.— The carrier fixed a charge for freight shipped in carload lots. For all shipments where the freight was less than a full carload a rate was charged greater in proportion than the rate on full carloads. The margin between the rates was substantial, and certain persons engaged in the business of soliciting and forwarding freight in small lots. The method was to combine such shipments so as to make full carloads. The freight thus forwarded in one car belonged to several shippers who received the benefit of carload rates. The carrier, in order to break up this forwarding business, promulgated a rule which declared that the rule as to carload rates shall apply only to rates from one shipper and will not cover less than carload shipments from two or more shippers combined into carloads by forwarding agents claiming to act as shippers. The words "forwarding agents" shall be construed to mean agents of the carrier and of the actual shipper, or persons interested in the combination shipments into carloads at the point of origin. *Lundquist v. Grand Trunk Railroad*, 121 Fed. Rep. 915 (July, 1901, Cir. Ct. No. Dist. Ill.).

The forwarding agents filed a bill alleging that defendants were guilty of unjust discrimination against complainants in violation of section 2 of the Interstate Commerce Act in favor of carload shipments by the owner of all the goods contained in a carload. That the latter received transportation for less than was charged to complainants, who also forwarded carload shipments to points between Chicago and New York. That complainants would suffer irreparable loss and injury, and their business would be broken up and destroyed unless the relief sought was granted. *Ib.*

The court denied the injunction on the ground that upon the pleadings and evidence it seemed clear that the service demanded by complainants, all the circumstances and conditions considered, was not a like and contemporaneous service of a like kind

of traffic under similar circumstances and conditions to those offered by defendants to owners of goods, as distinguished from forwarding agents representing several owners. Under the circumstances, and in view of the liability incurred by the carrier to the various owners, the court held that the rule adopted by defendants as to less than carload rates was not unreasonable.

The court (KOHLSAAT, J.), observed that the issues presented a pioneer case, and the court could derive little aid from authoritative sources, but upon the facts presented the court was clearly of opinion that the contentions of complainants could not be sustained. *Ib.*

§ 3. Unreasonable Preference or Advantage.—That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Duty to Connecting Lines.— Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Object and Scope of Section 3.— Section 2 was intended to protect the shipper who had been compelled to pay more to the carrier than another shipper was compelled to pay for a similar service. The carrier can favor one shipper at the expense of another. It can, in like manner, favor one locality at the expense of another. An individual shipper may be able to secure secretly from the carrier a lower rate than is paid by his rival for the same service. The carrier may also, from self-interest or other motive, favor a particular locality by making a lower rate to a particular point than is given to another point located, it may be, at a greater distance on the carrier's line. The merchants in the favored locality would thus be enabled to undersell their neighbors doing business in the locality discriminated against.

Carriers may also discriminate among themselves. They may furnish rates and facilities to one carrier which they deny to a competitor. They may discriminate not only in rates and charges, but also in the use of facilities for interchange of traffic.

The apparent object of section 3 was to protect a locality or community from being discriminated against, and also to protect a carrier from similar injustice, not only in the making of joint or through rates with competing lines, but in securing equal facilities over connecting lines.

The protection afforded by section 2 relates solely to moneys exacted unjustly from the individual shipper in excess of moneys received from another shipper for a like service. The protection afforded by section 3 relates to any unjust advantage or preference given to an individual, or to a locality, or with regard to any particular description of traffic, or to any unjust discrimination by one carrier against another carrier as to rates, charges, or facilities in operating connecting lines, or in making joint rates over connecting lines.

The appropriate remedy under section 2 is an action at law by the shipper to recover money damages. The government of the United States may now, under the Elkins Act of February 19, 1903, procure an injunction to restrain violations of section 2. The appropriate remedy under section 3 would seem to be in equity by injunction, or in case of discrimination among

carriers by writ of *mandamus* to compel the offending carrier to forward the freight. A shipper or carrier injured by a violation of section 3 may, under certain circumstances, seek his remedy at law for damages. But in the majority of cases the remedy for the grievances for a violation of section 3 is by way of injunctive relief.

Discrimination against a Locality — Remedy by Injunction.

-- Section 3 forbids the carrier to discriminate or give an unreasonable preference or advantage to a particular locality. A carrier sought to build up a seaport on its own line (Pensacola) at the expense of another port (Savannah) on a rival line. It may be conceded that this may be done to a reasonable extent. A carrier may so adjust its rates as to promote its legitimate interests. But it cannot for the purpose of building up a rival seaport on its own line adopt rates excessive in themselves unduly preferential to its own port (Pensacola) and unduly prejudicial to another port (Savannah). The rate on naval stores made by defendants between Pensacola and Savannah was found to be not only excessive but prohibitory. The action of defendants resulted not only in giving Pensacola an inferior market, a monopoly, but gave the entire control of that market to one dealer in naval stores. The court enforced by injunction the order of the Commission forbidding the rates complained of, on the ground that they were in themselves unlawful, in violation of section 1, and discriminated against a locality in violation of section 3. *Interstate Com. Co. v. Louisville*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

The Savannah Bureau of Freight and Transportation and nine other complainants in Florida on the line of the Pensacola and Atlantic division of the Louisville & Nashville complained to the Commission that the joint-tariff rates made by defendants on shipments now moving easterly from stations on said division from Pensacola to Savannah were *per se* unreasonable, and that they were relatively unjust and unreasonable when compared with the rates charged by defendants from the same stations moving westerly to Pensacola, Mobile, and New Orleans, and resulted not only in unjust discrimination against complainants, but gave an undue and unreasonable advantage to

the localities of Pensacola, Mobile, and New Orleans to the disadvantage and prejudice of Savannah and localities on said division between Savannah and Pensacola. It was alleged that defendant's object was to divert traffic from Savannah and deflect it to New Orleans by preventing the movement of cotton eastward from Pensacola to Savannah and intermediate stations, and cause it to move in the opposite direction toward New Orleans. With this end in view defendants advanced the rate on cotton shipped from Pensacola to Savannah from \$2.75 to \$3.30 per bale (this advance was made while the case was pending before the Commission). The rate from Pensacola to New Orleans was \$2.50 per bale. When the investigation was begun the New Orleans rate was \$2.50 per bale, and the Savannah rate was \$2.75 per bale, a difference of twenty-five cents in favor of New Orleans and Mobile. When the suit was instituted to enforce the order of the Commission, the New Orleans rate was \$2.50 and the Savannah rate was \$3.30, a difference of eighty cents in favor of New Orleans. There was no change of conditions, and the sole reason assigned for the higher rate was to increase the revenues of defendants. The average distances were as follows: From Pensacola to Savannah, 339½ miles; to New Orleans, 326 miles. Average distance to Savannah, 13½ miles greater than to New Orleans, yet the Savannah rate exceeded the New Orleans rate eighty cents per bale. *Held*, that defendants were not justified in making the Savannah rates. That they were unlawful in violation of section 1, and prejudicial against the localities of Savannah and intermediate stations between Savannah and Pensacola in violation of section 3. *Ib.*

Discriminations or preferences in rates may be justified to safeguard the interests of the public. The counter-proposition is true that they cannot be justified when they injure the interests of the public. *Ib.*

See also *Tift v. Southern Railroad*, 123 Fed. Rep. 789 (July, 1903, Cir. Ct. So. Dist. Ga.).

A shipper in Portland, Ore., filed a bill for an injunction under the Interstate Commerce Act, charging the carrier with fixing rates which gave an undue preference in favor of San Francisco and its merchants over Portland and its mer-

chants, and alleging that the rates charged from Portland were unjust and unreasonable. The court dismissed the bill on the ground that it was not alleged that the rates from Portland were not unjust and unreasonable in themselves, could not become so by comparison with other joint rates from an opposite direction, and from a different and competing point on the road of a different carrier who was not a party to the suit. *Allen & Lewis v. Oregon Railroad*, 98 Fed. Rep. 16.

Discrimination against Carrier — Remedy at Law.— Plaintiff, a carrier by water, sued defendant railroad at law for damages, alleging unjust discrimination by defendant against plaintiff in charging plaintiff \$1.25 per bale for transporting cotton from Mobile to New Orleans, while for the same service defendant charged other shippers and the general public eighty cents per bale, which was known as "the Mobile rate." Defendant in its answer claimed dissimilarity of circumstances and conditions, in that plaintiff was a carrier and transported its goods from Demopolis, Ala., to Mobile, for the purpose of re-shipping it from Mobile to New Orleans. That defendant had an agreement with the Louisville and Nashville and other carriers to make the rate from Demopolis to New Orleans \$1.25 per bale, and that as plaintiff brought its cotton by water from Demopolis to Mobile for re-shipment at that point defendant was bound to charge it the rate from Demopolis to New Orleans instead of the rate from Mobile. It appeared that plaintiff had no railroad from Demopolis to Mobile, but carried its goods between those points in packet-boats.

Plaintiff demurred to the answer, and the court sustained the demurrer, holding that defendant was not justified in charging plaintiff more to ship its goods from Mobile to New Orleans than it charged other shippers or carriers. That defendant, by refusing to ship for plaintiff at that rate, discriminated against plaintiff unlawfully, and that the conditions of dissimilarity created by defendant's consent or connivance was not a defense to the action. *Bigbee Packet Co. v. Mobile Railroad*, 60 Fed. Rep. 545 (December 30, 1893, Cir. Ct. So. Dist. Ala.).

See also *Cutting v. Florida Railway & Navigation Co.*, 30 Fed. Rep. 663 (April, 1887, Cir. Ct. No. Dist. Fla.).

“Facilities” Defined.— The word “facilities” in section 3, requiring carriers to furnish connecting lines with “equal facilities” has been held to include a through bill of lading. “The through bill of lading,” says SPEER, J., “is a facility, but is not a necessity for interchange of freight.” So held in a proceeding to compel a carrier by *mandamus* to furnish facilities to competing carriers over its line on equal terms. *Augusta Southern v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga. PARDEE, Circuit Judge, and SPEER, District Judge).

The case cited above contains the only judicial construction thus far of the word “facilities” or “equal facilities” as contained in section 3 of the Commerce Act. The court holds that interchange of freight is facilitated by the use of a bill of lading. In other words, that a bill of lading, as a convenient instrumentality for transportation of property, is a “facility” for interchange of traffic within the meaning of the statute. The technical meaning of the word upon standard authority fully supports this construction. The word “facility,” usually used in the plural, is thus defined in the Standard Dictionary: “Something by which anything is made easier or less difficult; an aid, advantage, or convenience.”

Facilities — Switches and Sidings.— The words “equal facilities,” or “facilities,” as used in the act, and as defined by lexicographers, is broad enough to include within its meaning sidings and switches. See *Interstate Stockyards* case, *infra*. This conclusion is especially justified in connection with the words “railroad” and “transportation,” as defined in section 1 of the statute. A railroad, the act declares, shall include not only bridges and ferries, but all the road *in use* by any corporation operating a railroad, whether owned or operated under a contract, *agreement*, or lease. The term “transportation” shall include “*all instrumentalities* of shipment or carriage.” It seems clear that a switch or a siding, constructed with or without an agreement with the shipper is an instrumentality of shipment. That is the only use to which a siding and siding switch is put. A siding or switch connection is a means by which loading merchandise for shipment “is made easier or less difficult.” It is certainly “an

aid, advantage, or convenience." This is clearly demonstrated in the case of shippers of coal. Sidings equipped with tipples and screens is practically the only method in use by which coal can be quickly and conveniently loaded upon cars for transportation. See *Harp* case, 125 Fed. Rep. 445, and other authorities, *infra*, and authorities under section 23 of the Commerce Act, *post*, page 327.

Facilities to Shipper — Switches, Sidings.— By the express terms of the Interstate Commerce Act there can be no lawful discrimination to the advantage or disadvantage of any person, place, locality, or kind of traffic. A common carrier of interstate freight cannot lawfully deny switch connections and service to one person, place, locality, or kind of traffic which it affords to others similarly situated. Defendant's counsel contended that certain switch connections were made simply for the purpose of delivering and receiving dead freight thereat and therefrom. The court held that the existence of switch connections rightfully existing implies the right of the owner thereof to service thereat by the carrier consenting to such connections. It would be a vain and foolish thing to incur the labor and expense of making such connections unless they were to be used in connection with the transportation of freight to and from the same. And, unless the right to service at such switch connections is limited, either expressly or impliedly, the owner thereof may lawfully insist that the carrier shall there deliver and receive all such freight as it customarily carries if the switch connections are suitable and convenient for the delivery and receipt of such freight. The carrier could not lawfully limit the right to use such switch connections for any kind of interstate freight transported by it when the switches were authorized by ordinance and statute, which contained no provision limiting their use. The ordinance and statute (Laws Indiana, 1885, approved March 2d) requires switch connections to be granted to all persons, and service in respect to all freight to be afforded upon equal rights and impartial terms. Nothing short of the clearest and most unambiguous language would justify the court in holding that it was the purpose of either the State or city to create a perpetual monopoly. *Interstate Stockyards v. Indianapolis Railway* (Cir. Ct. Dist., Ind., January, 1900), 99 Fed. Rep. 472.

Facilities to Shipper — Stockyards.— A common carrier of live stock, engaged in interstate commerce, has no right to discriminate as to stockyards affording facilities for feeding, watering, and resting stock. The Federal Live Stock Law and the Live Stock Law of Indiana, which is identical, imposes a duty upon the owner of the stock in the first instance. The carrier can act only when the owner neglects or refuses to comply with the provisions of the statute. *Interstate Stockyards v. Indianapolis Railway*, 99 Fed. Rep. 472.

Facilities to Shipper — When Contract for Void.— Defendant company made a contract with plaintiff whereby it agreed to furnish him cars and transport his lumber from Rankin, Ark., into the State of Texas, upon terms and conditions set forth in the contract. Plaintiff claimed that this contract had been violated by the carrier and sued upon it in the State court for damages for the breach. Defendant set up the defense that the contract was void, as it created a discrimination in favor of plaintiff and was in violation of the Interstate Commerce Act. The defense was sustained and the complaint dismissed, and the judgment of dismissal was affirmed by the Supreme Court of Arkansas. Upon writ of error to the United States Supreme Court *held*, that the latter court had no jurisdiction to review the judgment. The fact that a Federal statute has been construed unfavorably against one party gives the United States Supreme Court no jurisdiction, unless such construction was not only unfavorable but was against the right of a party to the suit. *Kizer v. Texarkana R. Co.*, 179 U. S. 199.

Facilities to Shipper — Reasonable Regulations.— The carrier is bound to treat all shippers impartially, charging each the same rate for substantially the same service and affording to each the same facilities for shipment. The carrier, however, has a right to establish reasonable rules and regulations governing the mode of shipment to enable it to handle and transport traffic conveniently, safely, and expeditiously. It may also, if circumstances require, revoke such regulations and substitute others. *Harp v. Choctaw Railroad*, 125 Fed. Rep. 445.

A carrier was sued for damages for unjust discrimination claimed to have been sustained by plaintiff. The evidence

showed that defendant had allowed shippers to load coal from wagons into cars upon its house track. The court held that defendant was not bound to continue to do so and was not liable in damages nor guilty of a legal wrong by discontinuing the practice, when it appeared that a continuance of it would result in loss and injury to the carrier, and that such revocation affected all shippers equally. *Ib.*

Facilities — Spur Tracks.— In the *Harp* case above cited it appeared that a carrier operating a railroad through a coal region in Arkansas was in the habit of permitting miners and shippers of coal to haul it to the station at Hartford, Ark., where it was loaded from wagons into cars furnished for that purpose by defendant on its side track. There were four other shippers of coal at Hartford besides plaintiff. Plaintiff did a good business and on the prospect of a continuance of it he purchased forty acres of coal land, near the Hartford station. His coal was shipped from Arkansas to points in Oklahoma and Texas.

Plaintiff alleged in his complaint that after August 1, 1901, and until February, 1902, defendant refused to set out coal cars on its side track, as it had done previously. That in October, 1901, defendant offered to furnish plaintiff cars for coal to be shipped within the State of Arkansas. Plaintiff had no customers for Arkansas shipments, and as defendant carrier refused to furnish plaintiff cars for interstate business he could do no business and alleged that by the act of the carrier his business was destroyed, and he claimed damages in the sum of \$6,000. In a second count of his complaint it was alleged that the carrier furnished cars to the four other shippers, competitors of plaintiff giving them an unreasonable preference and advantage, and unjustly discriminating against plaintiff. It appeared upon the trial that defendant was a miner and shipper of coal, as well as a carrier. It owned 1,600 acres of coal land near Hartford. The evidence further showed that when a shipper other than defendant desired to ship coal it was customary for him to make application to the carrier. The mine was examined by defendant's officers, and if the "quantity of coal therein seemed to be adequate to justify the expense, the practice was to make an agreement with the shipper, whereby the latter should secure a right

of way, and grade a track or spur from the mouth of the pit to the railroad, the latter agreeing to furnish the ties and rails, lay the track, and keep it in repair. In return for this outlay the shipper was to furnish for shipment coal for a certain number of cars per day, and to equip the track with tipples and screens, so that it could be quickly loaded. The practice of permitting loading from wagons, it was claimed, was a temporary arrangement pending construction of spur tracks and to permit development of mines.

When plaintiff was notified that no more cars would be furnished him he applied for a spur track, but the carrier refused to permit it to connect at its station, but insisted that the connection should be made elsewhere. How far the connecting point insisted on by the carrier was from the depot, the report fails to show. For this reason the negotiations for the spur track could not be consummated. On complaint to the State Railroad Commission defendant agreed to furnish plaintiff cars for shipment within the State and subsequently refused to furnish any cars. It also appeared in evidence that during the period when loading coal from wagons was permitted defendant had disposed of its coal lands, several mines had been opened in the vicinity of Hartford, and it had become a large shipping point for coal.

The court held, affirming the United States Circuit Court, that the facts did not establish a case of undue preference within the meaning and intent of the statute of Arkansas (Laws 1899, chap. 89) which declares in substance, that it shall be unlawful for a common carrier "to make any preference in furnishing cars or motive power" for the transportation of persons or property. The word "preference," the court said, "must be construed to mean preference as between persons occupying the same situation or relation to the carrier." That because plaintiff had not provided the spur track and tipples, as other shippers had done, the privilege he demanded of loading coal from wagons was different from the mode of loading practiced by other shippers. That the carrier has a right to make reasonable regulations as to the mode of loading cars applicable alike to all shippers, and that in discontinuing the practice of furnishing cars on side tracks to be loaded from wagons, it was not guilty of a legal wrong. *Harp v.*

Choctaw Railroad, 125 Fed. Rep. 445 (C. C. A., 8th Circuit, October, 1903).

Facilities to Carrier — Express Companies.— Express companies who are engaged independently of their forwarding business in operating railway lines are not governed by the provisions of the Interstate Commerce Act. One express company cannot sue another express company to compel defendant to furnish it with equal facilities on the same terms and conditions as are allowed other express companies. The rights and liabilities of such companies are governed by the common law. *Southern Express Co. v. United States Express Co.*, 88 Fed. Rep. 659 (August, 1898, C. C. Ind.) ; affirmed, March, 1899, 92 Fed. Rep. 1022.

In the case cited plaintiff sued two express companies. The relief prayed for was that defendants be enjoined from refusing to receive any and all parcels offered or delivered to them by complainants for transportation to consignees and from demanding pre-payment of their charges for transportation, from withholding sums known as "accrued charges," from refusing plaintiff the reasonable *pro rata* part of the charges complainants may earn upon express business originating off its line. On demurrers bill dismissed. *Ib.*

The court in the *Express Cases*, 117 U. S. 1, relied on in above case, held, that if the general public were complaining because the railroad companies refused to carry express matter or to allow it to be carried, a different question would be presented.

Discrimination among Carriers — Conflict of Authority.— The Interstate Commerce Act was intended to protect not only the shipper but the carrier. It expressly forbids unjust discrimination against the shipper. It also forbids unjust discrimination against connecting carriers seeking to make through rates and continuous carriage of freight over connecting lines. It requires that the carrier shall furnish the shipper equal facilities. It requires that a carrier shall furnish connecting carriers equal facilities for interchange of traffic, and section 7 specifically forbids any contract or combination among carriers by change of schedules or by carriage in different cars or other means or devices to prevent a connecting carrier from making through

shipments, and forbids breaking bulk, stoppage, or interruption as a device to evade the provisions of the act.

Notwithstanding these clear and explicit provisions decisions have been made holding that discrimination between connecting carriers are not violations of the act so long as the public are not inconvenienced.

The Supreme Court of the United States has never passed directly upon the interpretation which should be given to the last clause of the second paragraph of section 3 which declares that a carrier shall not be required to "give" the use of its tracks or terminal facilities to another carrier engaged in like business. This clause must be construed in connection with the first clause of the same sentence, which declares that every carrier according to its powers shall afford equal facilities for the interchange of traffic between respective lines for receiving, forwarding, and delivering, and forbids discrimination in rates and charges between connecting lines. These provisions are supplemented by like provisions in section 7 of the act. The authorities in regard to discrimination among carriers, however, are not uniform. There are some authorities in which carriers have been granted relief against connecting carriers.

On the other hand there are decisions holding that one carrier may use its tracks and terminal facilities in such a way as to discriminate in rates and charges with connecting lines. The courts in some cases have sustained the claim of a carrier that it has a right to permit one competing and connecting line to make through joint tariffs and routes over its line, and to refuse to make such tariffs with a competitor of the connecting line by imposing on one the necessity of reloading, rebilling, and prepaying freight, while it permits another to carry freight through to destination without breaking bulk, reloading, or rebilling, and arranging not only not to insist on prepayment of freight, but to advance the freight for the connecting line. It is obvious that if a carrier may thus discriminate in favor of a rival he may do so to an extent which will put its competitor out of business and destroy its property.

The Interstate Commerce Commission has construed the act to mean what it says. It has taken testimony in a number of cases and has ruled that while a carrier is not obliged to make

a contract for joint tariffs with a connecting line, yet if the carrier chooses to contract with one connecting carrier it will not be justified in refusing to another such carrier equal facilities and conditions, for the reason that to grant equal facilities to one and deny them to another would operate as an unjust discrimination within the meaning of the act. But the courts in the majority of cases have declined to enforce the orders of the Commissioners in this regard.

There is, however, one phase of the law bearing on this question which has not thus far been discussed in any reported decision, which amply supports the position taken by the Commission, which may be stated as follows: It must be conceded that the statute declares it to be unlawful for a carrier to discriminate against a shipper. Such discrimination has been uniformly held to be illegal. What authority is there then to support the proposition that a carrier may discriminate against a connecting carrier, even upon the theory that a carrier has a right to select its forwarding agent from among competing connecting lines. If such selection operates to discriminate unjustly against a competing connecting carrier, the statute declares the act to be unlawful. The right of a carrier to make through connections on the same terms and conditions as are given to competing connecting lines is a property right, as much so in a carrier as it is in a shipper. The connecting carrier like the shipper is entitled to the equal protection of the laws, under the Fourteenth Amendment, and cannot be deprived of its property arbitrarily or without due process of law. The law places all carriers engaged in interstate commerce upon an equality, in that one shall not discriminate against the other. The act of a carrier in refusing to give to a connecting line the same rate and facilities for through freight that it gives to a competing connecting line, whereby the business of the latter is diverted, injured, or destroyed, thereby deprives it not only of its property without due process of law, but by its act the competitor is deprived of the equal protection of the laws. Such an act clearly operates as a discrimination against the carrier injured, and such discrimination is expressly forbidden and declared to be unlawful by the Interstate Commerce Act.

The authorities on this branch of the law are as follows:

Discrimination among Carriers — Equal Facilities Compelled.

-- The New York and Northern railroad secured from the Interstate Commerce Commission an order requiring the New York and New England railroad to afford the petitioner equal facilities to those furnished by the New England road to the Housatonic railroad. Application was made to United States Circuit Court (So. Dist. N. Y.) to enforce the order. The petitioner charged that defendant had deprived the petitioner of reasonable, proper, and equal facilities (as compared with those afforded to the Housatonic road, a competing connecting line) for the interchange of traffic between petitioner and defendant. It was also shown that defendant discriminated against the petitioner in rates; that a contract for a joint through traffic, formerly in force, was withdrawn, and defendant threatened to close the through route *via* petitioner's line, and refused to accept freight at all on through bills, thus compelling petitioner's patrons to attend at Brewster's — the point of connection — to transfer and rebill their goods. The Commission found the facts in favor of petitioner and held that the defendant was guilty of discrimination in rates and charges for interchange of traffic and in arrangements for through lines for freight traffic. Defendant complied with the order in so far as to desist from refusing freight on through bills, and restored the joint through tariff. But defendant so arranged the running of its trains that the facilities for interchange were substantially no better than before service of the order. The court, LACOMBE, J., held that the order could not be evaded by the devices resorted to. *New York and Northern v. New York and New England*, 50 Fed. Rep. 867 (May, 1892, Cir. Ct. So. Dist. N. Y.).

In construing section 4 of the act, with regard to the long and short haul provision, it was held that two railroads cannot be compelled to unite in making joint through rates over connecting lines, if they do not choose to do so voluntarily. *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912. But if a carrier chooses to make a joint through rate with another, and refuses to give the benefit of its facilities to a competitor, and declines to make equally favorable terms and conditions with the competitor, as

it has given its rival, such refusal constitutes an unjust discrimination in rates and charges between connecting lines, which is forbidden and made unlawful by section 3 of the act.

The New York and New England railroad made joint through tariff arrangements with two connecting competing lines, to-wit, with the New York and Northern, and with the Housatonic company. It afterward withdrew the joint through tariff agreement with the New York and Northern, refused to accept its freight on through bills, and threatened to close the through route *via* the Northern line. *Held* to be a deliberate refusal to "afford all reasonable, proper, and equal facilities for the interchange of 'traffic' with a connecting line which the statute makes it his affirmative duty to afford." *Ib.*

Judge LACOMBE, in a subsequent case (January, 1896, *Prescott and Arizona Railroad v. Atchison Railroad*, 73 Fed. Rep. 438), took occasion to refer to the *New York and Northern* case, above reported, and citing some latter cases in the Circuit Court of Appeals, bearing on a similar point, said, that he felt constrained to follow them as rulings of the Circuit Court of Appeals. He referred to *Little Rock v. St. Louis Railroad*, 63 Fed. Rep. 775; and *United States v. Trans-Missouri Freight Assoc.*, 7 C. C. A. 15; S. C., 58 Fed. Rep. 58.

He held accordingly in the *Prescott and Arizona* case, that a carrier could employ as its forwarding agent on through bills of lading without breaking bulk one of several competing carriers to the exclusion of the others. Under the authorities existing at the time of his decision Judge LACOMBE said he was obliged to hold that there was nothing in the Interstate Commerce Act to make such a contract unlawful, and further that such a contract with one carrier to the exclusion of other competitors was not a contract in unlawful restraint of trade, or creating a monopoly in violation of the Sherman Act of July 2, 1890. *Prescott and Arizona Railroad v. Atchison Railroad* (January, 1896, Cir. Ct. So. Dist. N. Y.), 73 Fed. Rep. 438. See also *St. Louis Drayage Co. v. Louisville Railroad*, 65 Fed. Rep. 39 (December, 1894, Cir. Ct. East Dist. Mo.); *Oregon Short Line v. Northern Pacific*, 61 Fed. Rep. 158 (C. C. A. 9th Circuit, April, 1894), affirming 51 Fed. Rep. 465.

Since the decision in the *Prescott and Arizona* case by

Judge LACOMBE, the Supreme Court of the United States has reversed the *Trans-Missouri* case (166 U. S. 290), holding that the contract which was the subject of complaint in that case was illegal and void, and created a monopoly in restraint of trade in violation of the Sherman Anti-Trust Law of July 2, 1890. Compare also the case decided in April, 1896. *Augusta Railroad v. Wrightsville Railroad*, holding that such an agreement by a carrier with a connecting line to the exclusion of competitors was illegal, created an unjust discrimination, and could be remedied by invoking a writ of *mandamus* to compel the resisting carrier to forward the freight of the competitor on like terms, and furnish like facilities as were furnished to the rival competitor. *Augusta Railroad v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga.). For a fuller report of this case, see *post*, page 239. See also *Bigbee Packet Co. v. Mobile Railroad*, 60 Fed. Rep. 545, *ante*, page 73, which holds that a connecting carrier discriminated against by another carrier who sustains damages thereby may sue at law, and recover such damages.

Discrimination among Carriers — Relief Refused.— The authorities holding that a carrier, though it cannot discriminate against a shipper, may, under circumstances to a limited degree, discriminate against a connecting carrier, provided the public are not thereby inconvenienced, are as follows:

Discrimination among Carriers — Advance Payments — Through Billing.— It has been held that a common carrier engaged in interstate commerce may lawfully discriminate against another carrier under the Interstate Commerce Act by demanding payment of freight charges in advance when such freight is delivered to it by a connecting carrier. It was held further that it was not an unlawful discrimination for such carrier to receive the freight of another connecting carrier without exacting freight charges in advance. A carrier may, if it chooses, advance freight charges to one connecting carrier and refuse to make such advances to another connecting carrier. *Gulf Railroad v. Miami SS. Co.*, 86 Fed. Rep. 407 (C. C. A. March, 1898), reversing lower court.

One carrier may, if it chooses, contract with one connecting

carrier for through transportation, through joint traffic, through billing, and for the division of through rates. A refusal to make a similar contract with another competing or connecting carrier the court held would not operate as a discrimination or unlawful prejudice under section 3 of the Interstate Commerce Act. *Ib.*

As to whether such acts, whereby equal facilities were granted one carrier to the exclusion of another, created a monopoly, condemned by the Sherman Anti-Trust Act, the court did not decide, for the reason that that question could be raised only in an action brought by or on behalf of the government of the United States as a party plaintiff. *Ib.*

The carrier can, however, in a suit brought by it, sue a connecting carrier for treble damages under section 7 of the Sherman Act, if it can show that it has been injured in its business or property by the unlawful act of such carrier. See Sherman Act, section 7, *post*, page 145.

The Little Rock Cases.— The plaintiff's road extended from Memphis to Little Rock; the defendant's road extended from Memphis to Little Rock, and thence south into Texas. The defendant refused to contract with plaintiff for through routing and through rating over its road. Plaintiff claimed also that defendant contracted with the Bald Knob branch road and the Hot Springs road to sell through tickets from Memphis and to points south over the roads of the latter companies, and that the latter sold through tickets over their own and defendant's roads and refused to sell through tickets to Memphis and points south over plaintiff's road on same terms and conditions. Plaintiff prayed for an injunction commanding the defendant, the Hot Springs road, and its agents to sell through tickets to Memphis and points south, over plaintiff's road on same terms as charged to persons buying tickets over the Bald Knob branch, and to check baggage with same. The court held that it was not an unjust and unfair preference or discrimination for defendant to sell tickets over its own line, in preference to plaintiff's, and that the court had no power to compel it to do so. Injunction denied and bill subsequently dismissed. *Little Rock Railroad v. St. Louis Railroad*, 41 Fed. Rep. 559 (March, 1890, Cir. Ct. ed. Ark.).

The question as to whether the making of the contract complained of between the defendant carriers and defendant's refusal to carry persons over plaintiff's road amounted to a "discrimination in rates and charges between connecting lines" in violation of section 3 of the act, was not raised, discussed, or passed upon by the court in the above case. But that question was litigated in the case of the *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771, based on facts substantially similar.

In the case referred to it was alleged that the defendants, the Iron Mountain and East Tennessee roads, had entered into a traffic arrangement whereby they sold through tickets to points beyond Little Rock, over the Bald Knob branch of the Iron Mountain, the benefits of which were refused to plaintiff. The Iron Mountain refused to sell through tickets over plaintiff's road to Memphis and points beyond. The East Tennessee refused to sell through tickets over plaintiff's road and the Iron Mountain refused to recognize such tickets on its road. Plaintiff claimed that defendant carriers thereby unjustly discriminated against it. Defendants demurred to the bill. The court sustained the demurrer, holding that the facts alleged did not constitute unjust discrimination among the carriers. "It is a misnomer," said the court, "to call that which the Iron Mountain is doing 'a discrimination' against the plaintiff under the act. It is not the case of a road preferring unjustly, unduly, and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so doing its business and using its powers of ownership as to divert travel from its rival to itself." *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771 (September, 1891, Cir. Ct. West. Dist. Tenn.).

Little Rock Cases — Facilities to Carrier — Use of Tracks.—

In suits brought in the eastern district of Arkansas by one carrier against other carriers for a violation of the second clause of section 3 for refusal by defendants to furnish plaintiff, a competing connecting carrier, equal facilities for interchange of traffic, the court on demurrer dismissed the bills and denied plaintiff the relief sought. This apparent violation of the pro-

visions of the statute was excused on the ground of ownership of the through line. The court said that defendants were not required to allow plaintiffs "the use of their tracks" to enable plaintiff to do business as a carrier of interstate commerce. As the relief sought could not be granted without the use of defendant's tracks, and requiring defendants to haul freight in other cars than their own, over their own tracks, at a less rate than they would receive if the freight was hauled in their own cars, the relief could not be granted. The court held further that defendant operating a connecting road, while it permitted through billing and routing to one of defendants, could not be required to give the same facilities to plaintiff, although they possessed all the necessary tracks and terminal facilities. That defendant could insist that all freight offered by plaintiff must be carried in defendant's cars, and that defendant could lawfully require reloading and rebilling at local rates. That defendant could permit the use of its tracks to one competing connecting line to the exclusion of another. *Little Rock Railroad v. St. Louis and Iron Mountain* (January, 1894), 59 Fed. Rep. 400; affirmed, September, 1894, 63 Fed. Rep. 775. See also *Cowan v. Bond*, 39 Fed. Rep. 54 (May, 1889, Cir. Ct. So. Dist. Miss.). See also *Oregon Short Line v. Northern Pacific*, 61 Fed. Rep. 158 (C. C. A., 9th Circuit, April, 1894), affirming 51 Fed. Rep. 465, holding that a carrier may agree to prepay freight received by it from one connecting carrier and refuse to do so for another competing connecting carrier. Compare *New York and Northern Railroad v. New York and New England*, 50 Fed. Rep. 867, *ante*, page 82, and cases *supra*.

Little Rock Cases in Supreme Court.—The Supreme Court of the United States did not pass upon the merits involved in the discussion in the Little Rock cases. They were dismissed upon a technicality as to the jurisdiction of the Supreme Court at that time. In the case of *Little Rock and Memphis v. East Tennessee* an appeal was taken directly to the Supreme Court from a decree of the Circuit Court of the United States for the western district of Tennessee. The Circuit Court had dismissed the complainant's bill in its suit in equity for an injunction to enforce an order of the Interstate Commerce Commission for refusal to afford complainant "the same equal facilities as are

afforded to any other connecting road," and for other relief. The Supreme Court held that as the law then existed the appeal would not lie unless it clearly appeared that the subject in dispute shall be of the value of \$2,000. Appeal dismissed. *Little Rock and Memphis v. East Tennessee*, 159 U. S. 698, December, 1895. Citing *Interstate Com. Co. v. Atcheson Railroad*, 149 U. S. 264.

The court, in the case of the *Little Rock v. St. Louis and Iron Mountain* (59 Fed. Rep. 400; affirmed, 63 Fed. Rep. 775), holding that a carrier, while giving through facilities to one connecting line, could compel another to use different cars, break bulk, and re-load, did not refer to section 7 of the Commerce Act, nor construe the provisions of that section which forbids a carrier to compel carriage in different cars, or change of time-table, or breaking bulk, stoppage, or interruption when used as a device to prevent the carriage of freight from being continuous, or to evade in anywise the provisions of the act.

On the question of discrimination by a carrier in making joint through rates with one connecting line to the exclusion of another, the language of Judge LACOMBE, in the *New York and Northern* case above cited, is still pertinent, since the decision reversing the *Trans-Missouri* case (166 U. S. 290), and the recent decisions in the *Addystone Pipe* case and the *Northern Securities Merger* case. In the *New York and Northern* case, the court enforced the order of the Interstate Commerce Commission directing the discrimination against the plaintiff carrier to cease. Judge LACOMBE, in the case referred to, said: "The only link between them, *i. e.*, between the New York and New England Company and the Housatonic Company, is such community of interest as springs from the existence of the contract for the interchange of traffic, which it is claimed secures the Housatonic road unequal facilities. If it be that such a contract makes each line a mere continuation or extension of the other it is hard to conceive how a case, of refusing equal facilities, could ever be made out." The court granted the relief prayed for and enforced the order of the Interstate Commerce Commission requiring defendant company to afford plaintiff equal facilities with the Housatonic Company and to cease discrimination against plaintiff in through rates. *New York and Northern Railroad v. New York and New England*, 50 Fed. Rep. 867.

Through Rates — Liability of Connecting Lines.— In the absence of an agreement to extent its liability beyond its own lines a carrier taking freight and passengers for transportation to points on connecting lines is not liable for loss or injury resulting beyond its own line. And an advertisement by the carrier that it runs or connects with trains of another company, so as to form through lines without breaking bulk or transferring passengers, is not sufficient to establish a contract under which profits and losses are shared with connecting lines, so as to render the carrier liable beyond its own line. *Pennsylvania Railroad v. Jones*, 155 U. S. 333.

§ 4. Long and Short Haul Regulations — Power of Commission as to.— That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Object and Scope of Section 4.— The provisions of this section, familiarly known as the “long and short-haul clause” of

the act, was intended to protect shippers in certain localities from being discriminated against in favor of shippers in localities farther from the initial point of shipment. Goods are shipped on through bills of lading across the continent from New York, Boston, Baltimore, and other ports on the Atlantic seaboard to San Francisco, Los Angeles, Portland, and other points on the Pacific coast, and to the multitude of intermediate points. The intention of Congress was to protect a shipper, whose goods were carried but a short distance, from paying more for transportation of his merchandise than a shipper whose goods were carried, under similar circumstances and conditions, a much longer distance in the same direction.

In construing this most important section the Supreme Court of the United States have laid down the rule, in some cases, that competition, no matter where it originates, and whether actual or potential, creates a dissimilarity of circumstances and conditions, which will justify the carrier in charging more for a short than for a long haul over its line for like merchandise carried in the same general direction. The question, therefore, as to what constitutes *bona fide* competition seems to be the principal inquiry involved in controversies arising under section 4.

Domestic Commerce — Long and Short-haul Clause.— A State may constitutionally prohibit a short-haul charge in excess of a long-haul charge in case both hauls are within the limits of the State. But if the direct result of a rate fixed by State law or the State Railroad Commission on points within its borders operates to regulate the interstate rate fixed by the carrier so as to impair its business, the local rate fixed by the State will be held to be a regulation of interstate commerce and void for that reason. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27.

Defendant's road extended from Nashville, Tenn., to Louisville, Ky., a distance of 185 miles. The road passed through Franklin, Ky., and the distance from Franklin to Louisville, Ky., was but 134 miles. The rate charged upon tobacco from Knoxville to Louisville was twelve cents per hundred pounds, while upon tobacco shipped by Eubank, defendant in error, from Franklin to Louisville, he was charged twenty-five cents per hundred. Under the Constitution and laws of Kentucky this rate

of twenty-five cents per hundred on tobacco shipped from Franklin to Louisville was claimed to be illegal, because it was greater than the charge imposed for hauling tobacco from Knoxville to Louisville, for which the rate was but twelve cents per hundred. Eubank sued the carrier to recover the excess, to-wit, thirteen cents per pound on 145,245 pounds of tobacco, shipped by him from Franklin to Louisville. The carrier demurred and the demurrers were overruled by the Circuit Court of Simpson county, Kentucky. Defendant then interposed special pleas to which plaintiff demurred and judgment was given sustaining these demurrers and awarding plaintiff judgment for \$181.88, the excessive freight and costs. The case went directly to the United States Supreme Court, no ruling having been made thereon by the Supreme Court of Kentucky, presumably for the reason that the amount involved gave no right to review in the Supreme Court of the State. The judgment was reversed in the Federal court, upon the ground that by the demurrer it was admitted that the carrier would be obliged to give up its business of hauling freight from Nashville to Louisville unless it made its rate twelve cents per hundred, which is below what is fair and reasonable between those points by reason of water competition. That if the rate were fixed at twenty-five cents per hundred between the points named the carrier averred it could get no business. For this reason it claimed that the operation of the State Constitution and the statute based on it operated to interfere with a regulation of interstate commerce and was, therefore, void. The majority of the court held that the operation of the laws of Kentucky on the facts admitted by the demurrer affected a regulation of interstate commerce, although it related directly to points of shipment in Kentucky and was, therefore, void. *Ib.*

Long and Short Haul — Competition Primary Factor.— In construing the provisions of the Interstate Commerce Act with respect to the long and short-haul clause, regard must be had to the competition which exists to points affected. *Interstate Com. Co. v. Alabama Railroad*, 168 U. S. 144.

The Board of Trade of Troy, Ala., complained that defendants charged a higher rate for goods shipped from the seaboard to Troy than on shipments of similar goods carried through Troy

to Montgomery, a point a longer distance than Troy, being distant fifty-two miles farther. It was claimed that Troy was in active competition with Montgomery for business, and that defendants discriminated unjustly in their rates against Troy and gave to Montgomery an undue preference or advantage on certain commodities, charging as follows: \$3.22 per ton on phosphate rock to Troy, and but \$3 per ton to Montgomery, and all such rock hauled to Montgomery must of necessity be hauled through Troy. That rates on cotton shipped to Atlantic ports were forty-seven cents per hundred from Troy and only forty cents from Montgomery, a longer distance, and other like discriminations set forth in the complaint. After a full hearing before the Interstate Commerce Commission the latter made an order directing the carriers "to cease and desist" from charging more on shipments to Troy than to Montgomery on cotton and other commodities set forth in detail in the order. The carriers, who claimed that the circumstances and conditions between the points were dissimilar, by reason of competition, refused to obey the order and the Commission filed a bill to compel obedience to it. The bill was dismissed and the dismissal affirmed in the Court of Appeals. In the United States Supreme Court (HARLAN, J., dissenting) the decree appealed from was affirmed. *Ib.*

The court held that the existence of competition between competing carriers was a fact which rendered conditions of shipment under the long and short-haul clause of the act substantially dissimilar. That the second section of the act forbidding special rates, rebates, and drawbacks competition affecting rates had no application. *Ib.*

The court, in order to limit the scope of its decision in this regard, observed: "We do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraint of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.'" *Ib.* Citing *Cincinnati Railway v. Interstate Com. Co.*, 162 U. S. 184; *Texas and Pacific v. Interstate Com. Co.*, 162 U. S. 197.

Long and Short Haul — Competition.— The fourth section of the Interstate Commerce Act is violated if the carrier charges more for a shorter than for a longer distance, and the circumstances and conditions at the longer distance point are substantially similar to those at the shorter distance point. But if it is shown that the circumstances and conditions at the longer distance point are substantially dissimilar the statute has not been violated. *Interstate Com. Co. v. Western Railroad* (June, 1898, Cir. Ct. No. Dist. Ga.), 88 Fed. Rep. 186; affirmed, 93 Fed. Rep. 83.

Competition at a given point will create such dissimilarity in circumstances and conditions as will justify the carrier in charging more for a short than for a long haul over its line. But the competition must be *bona fide* and substantial and not imaginary or trifling. Such charge if justified by genuine competition can scarcely be said to create an undue or unreasonable preference under section 3. Section 2 of the act deals wholly with shippers and moneys paid by them to the carrier, and does not relate to inequality of rates with respect to particular localities. *Ib.*

One of the circumstances to be considered which will justify the carrier in charging more for a short than for a long haul is competition, not merely between carriers by rail and carriers by water, but competition generally between rival carriers. "That which the act does not declare unlawful," says Judge COOLEY, "must remain lawful if it was so before, and that which it failed to forbid, the carrier is left at liberty to do without permission of any one." *Brewer v. Central Georgia Railroad*, 84 Fed. Rep. 258 (January, 1898, Cir. Ct. So. Dist. Ga.).

In the case cited plaintiffs, wholesale merchants of Griffin, Ga., secured from the Interstate Commerce Commission an order directing defendant to desist from charging greater freight rates from Cincinnati and Louisville to Griffin than it charged from the same points to Macon, being sixty miles farther. The action was brought in the United States Circuit Court, southern district of Georgia, to enforce the order. The court, after a careful review of the facts, denied the application for a mandatory injunction, and dismissed the bill. The court held that the facts showed that the competition existing at Macon created

a dissimilarity of circumstances and conditions which justified the increased charge for the shorter haul. *Ib.*

Where a greater charge is made for a shorter than for a longer haul by the carrier, it is competent for the carrier to show the existence of competition to justify the rate charged, if it appears that such competition has a substantial and material affect upon traffic and rate making, even though the competition is between carriers who are all subject to the Interstate Commerce Act. *Interstate Com. Co. v. Southern Railway*, 105 Fed. Rep. 703.

The court was asked to enforce an order of the Interstate Commerce Commission directing defendants to desist from charging more for freight carried from Atlantic ports to Piedmont, Ala., than was charged for freight from same points to Anniston, Ala., a shorter distance. The Commission ruled that the evidence showed that the rates to Piedmont were not, in themselves, excessive or unreasonable, but that they were unreasonable and unjust as compared with the rates to Anniston in that they gave to the latter city an undue preference or advantage, and subjected the former to an undue prejudice or disadvantage in territory in which they meet in active competition. The court held that the evidence offered by the carriers of competition among carriers to the points in question should have been considered. If the evidence justified the conclusion that it was *bona fide*, it was a justification of the rates charged, because the conditions and circumstances became thereby substantially dissimilar. *Ib.*

Citing *Interstate Com. Co. v. United States*, 162 U. S. 197; *Railroad v. Behlmer*, 175 U. S. 654; *Interstate Com. Co. v. Alabama Railway*, 168 U. S. 144.

Bona Fide Competition — Dissimilarity — Discrimination.—

When a violation of the long-and-short-haul clause of the Interstate Commerce Act is charged, competition is one of the elements which enter into the determination whether the conditions are similar. If a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. *East Tennessee R. Co. v. Interstate Com. Co.*, 181 U. S. 1. Citing *Texas & Pac. R. Co.*

v. Interstate Com. Co., 162 U. S. 197; *Interstate Com. Co. v. Alabama R. Co.*, 168 U. S. 144; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, and reversing decree of Court of Appeals, 99 Fed. Rep. 52.

In fixing rates to and from competitive and noncompetitive points, the carrier may take into consideration the competition which exists, and as to whether such competition is substantial and controlling upon rates. Such competition is in and of itself the dissimilarity of circumstances and conditions described in the statute. *Ib.*

The Board of Trade of Chattanooga, Tenn., sought redress from the Interstate Commerce Commission for an alleged violation of the long-and-short-haul clause of the Interstate Commerce Act. It was alleged that on freight shipped from Boston, New York, Philadelphia, Baltimore, and points on the eastern seaboard, through Chattanooga, to the cities of Nashville and Memphis, far beyond Chattanooga, certain carriers charged more for freight shipped to Chattanooga than to the more distant points, Nashville and Memphis, thus not only violating the long-and-short-haul clause of the act, but discriminating against Chattanooga. *Held*, that in fixing the rate, it was shown that the carriers were compelled, by reason of the competition which existed in rates to the more distant cities of Nashville and Memphis, to charge less for freight to those cities than was charged to Chattanooga, which was a non-competitive point. That the existence of this competition rendered the circumstances of shipments to the respective points dissimilar within the meaning of the statute, although the lesser charge to the competitive point may seemingly give a preference to the latter. *Ib.*

The following table shows the rates charged by the carriers to Chattanooga, Memphis, and Nashville, respectively, and which was the subject of complaint:

CLASSES OF FREIGHT.	1	2	3	4	5	6
To Chattanooga	114	98	86	73	60	49
To Memphis, 310 miles further....	100	85	65	45	38	35
To Nashville, 151 miles further....	91	78	60	42	36	31

It was thus shown that the carriers charged for transporting 25 to 60 per cent. less from New York through to Nashville, than from New York to Chattanooga over the same tracks and in the same trains, the distance to Chattanooga being 151 miles less than to Nashville. Defendants sought to justify by claiming that they encountered competition at Nashville. Potential, but not actual, competition was suggested by reason of water rates, which might be had on boats plying the Cumberland river from Evansville and Cincinnati, at least during part of the year. Defendants also claimed competition to Nashville, created among the carriers themselves. The Circuit Court and Court of Appeals held, Judge TAFT writing the opinion, HARLAN and LURTON concurring, in the Court of Appeals, that there was no evidence to sustain the claim as to water competition, and that the competition among the carriers resulted in an agreement among themselves, which practically amounted to an agreement in restraint of trade to stifle competition. The Supreme Court reversed the Court of Appeals, assigning error in excluding certain evidence on these points before the Commission. *Ib.*

Judge Taft on Actual and Potential Competition.— In reversing the *East Tennessee* case, the Supreme Court (181 U. S. 1) said that such reversal was without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to hear and determine the matter according to law. How far, upon such re-hearing, the views of the Circuit Court of Appeals, as expressed by Judge TAFT, may be pertinent could be ascertained only upon a second trial of the case and in view of additional evidence, since the reversal was upon the authority of the *Behlmer* case, 175 U. S. 648. The opinion of Judge TAFT on the question of competition in the *East Tennessee* case, in which Justice HARLAN, sitting in the Court of Appeals, concurred, is interesting. Judge TAFT said:

“It is contended on behalf of the defendants that the circumstances and conditions of their Nashville business are not similar to those of their Chattanooga business, in that at Nashville they encounter competition which they must meet by lowering their rates in order to secure any business at all, while at Chattanooga such competition does not exist. This competition is said to be of two kinds:

"First, the potential, but not actual, competition afforded by the situation of Nashville on the Cumberland river, by which it may be reached nine months in the year by steamboat from Evansville and Cincinnati. This gives Nashville water communication with points on the east and west trunk lines whose rates are $33\frac{1}{4}$ per cent. less than the southern rates, and thus, it is said, makes it practically a trunk-line point. The evidence does not sustain the claim that in respect to through rates from New York to Nashville *via* Ohio river points the river competition has any effect whatever. The witnesses for the defendants admit that no through freight from New York to Nashville is ever carried by the Ohio and Cumberland rivers; and this although the rates by river are from 20 to 25 per cent. less than the proportion of the through New York rate to Nashville, collected by the Louisville & Nashville Railroad Company for carriage from Cincinnati to Nashville. But it is said that if the rate is increased to Nashville so as to make it the same as that to Chattanooga then the river lines will become formidable competitors of the Louisville & Nashville Railroad Company in the through traffic; and freight experts have been produced by the defendants who vaguely express the opinion that to increase the additions made to the trunk-line rates from New York to Cincinnati by the Louisville & Nashville Railroad Company, for its part of the through carriage to Nashville, would induce river competition on this traffic.

"There has been presented to us an able argument to show the powerful effect of potential water competition upon railway rates in cases where comparatively a small percentage of the freight is actually carried by water. The effect of the Erie canal upon grain rates of freight is cited as a significant illustration. We fully concede much of what is contended on this head, but we find it to have little or no application to the case in hand. It appears by the undisputed evidence that the rates of the Louisville & Nashville railroad from Cincinnati, Louisville, and Evansville have practically destroyed, not only the New York through business by river, but the local river business from those points to Nashville. The total amount of traffic on the Cumberland river to Nashville is so insignificant, as compared with the local traffic to the same place, that it is not worthy of notice. Now, the local railway rates to Nashville from Ohio river points are about 50 per cent. higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville & Nashville company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum, it is clear that any increase on through rates, under which they would still be

less than local rates, cannot affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate. We may, therefore, eliminate Cumberland river competition as a factor in reaching our conclusion.

"The next question for our consideration is whether the competition of the trunk lines to Cincinnati, and of the Louisville & Nashville railroad to Nashville, makes the conditions of defendants' traffic at that place different from those at Chattanooga. It is settled in the case of *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 164, 167, 18 Sup. Ct. 45, 42 L. ed. 414, that competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar; that the mere fact of competition, however, no matter what its extent or character, does not necessarily relieve the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude consideration of competition in determining dissimilarity of conditions, and that competition may in some cases be such as, having due regard to the interests of the public and the carrier, ought justly to have effect upon the rates. It is then the duty of the commission and the reviewing courts in such cases to consider, not only the extent, but the character, of the competition relied on as a justification for discrimination against the nearer point. It must, therefore, be relevant to ask why such competition is not also present at the nearer point. If the answer to the question is found in the absence at the nearer point of competing railway lines, of water competition, and of other circumstances naturally creating competition, then the further point may be reasonably held to be merely enjoying in its lower rates its normal advantages, which may and do justly overcome the mere disadvantage of the greater distance of the haul. But when we find that the nearer point has not only the advantage of less haul, but also more railway lines in actual competition, and that there are no other circumstances of substantial advantage in favor of the more distant point, we have a case which the fourth section of the Interstate Commerce Law was passed to meet.

"It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of condition in the face of such a rate. This is only one of many arguments advanced on behalf of appellants, which, reduced to their last analysis, involve, as a major premise, that the existence of a rate and

movement of business under it are a complete justification of it, and foreclose judicial investigation. Such an assumption renders the Interstate Commerce Law nugatory and useless. There are other causes than normal competition that produce discriminatory rates. The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality, when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called Federal Anti-Trust Act. *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259; *U. S. v. Addystone Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. Certainly such a difference in conditions ought not to justify a difference in rates before the Commission or the court.

"Chattanooga is 151 miles nearer than Nashville to New York by the southern and most direct routes. It has at least three through competing southern lines from New York under different managements. These lines reach Nashville over one road from Chattanooga. Chattanooga is connected with Cincinnati, where the stream of traffic of the east and west trunk lines is reached, by a railroad 335 miles in length. Nashville reaches the same city by a railroad 295 miles in length. So far as the record shows, the conditions of railroad transportation between Cincinnati and Nashville are not substantially different from those between Cincinnati and Chattanooga. Both the Louisville & Nashville and the Cincinnati Southern are southern roads. The Louisville & Nashville does not encounter as much unrestricted competition at Nashville as the Cincinnati Southern at Chattanooga, for the only other line entering Nashville is the Nashville & Chattanooga company, of which the Louisville & Nashville company owns more than one-half the stock. But it is said that the Louisville & Nashville company is vitally interested in building up Nashville by enabling her merchants to compete with those of cities on the Ohio river. Why should the interest of this company be any greater in Nashville than that of the Cincinnati Southern railroad in Chattanooga? The difference in the Chattanooga and Nashville rates is to be found in something other than the physical conditions existing at the two cities; for, regarding them alone, there is no reasonable ground for any substantial disparity. The evidence shows that

the rates to Chattanooga from Cincinnati and from the eastern seaboard have always been fixed and agreed upon by an association of the southern railway and steamship companies. The Louisville & Nashville company has not been a member of it, but the Nashville, Chattanooga & St. Louis company, of which the Louisville & Nashville company owns a majority of the stock, has always been a member; and so has the Georgia Central Railroad & Banking Company, whose road from Atlanta to Savannah the Louisville & Nashville company jointly operates.

"The association has grouped Chattanooga with a large number of towns to the south of it for the same rates, and all the members of the association make their rates to Chattanooga accordingly. The Cincinnati, New Orleans & Texas Pacific railway has been a member of this association, and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of its New York rate. Without such an agreement, it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville. The result of the agreement is to deny to Chattanooga the natural advantage which direct connection with Cincinnati secures to Nashville, and ought to secure to Chattanooga. The agreement is more than a mere tacit understanding resulting from a praiseworthy desire to avoid rate wars and the carriage of goods at less than cost; for the rates to Nashville are admitted to pay a profit over the cost of transportation, and they are from 25 per cent. to 50 per cent. less than the Chattanooga rate for a considerably longer haul, with no apparent difference in conditions.

* * * * *

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, this is no ground for refusing to do justice to Chattanooga. The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates,

when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of re-adjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

Danville and Lynchburg Cases.—The grounds of complaint were based substantially on the claim that the through rate made by defendants from the west *via* Lynchburg to Danville was greater than the rate to Lynchburg, and that the rate to Richmond *via* Lynchburg was less than that to Danville, though the latter was nearer to the shipping points than Richmond. The principal grievance against the Southern railway was as to the rate charged for freight between Lynchburg and Danville.

The following table shows the rates per 100 pounds to Lynchburg and Danville:

	Class 1.	Class 2.	Class 3.
Boston to Lynchburg	54	47	28
Boston to Danville.....	71	63	52
New York to Lynchburg.....	54	47	38
New York to Danville.....	66	58	47
Baltimore to Lynchburg	49	42	33
Baltimore to Danville	60	52	41
Chicago to Danville.....	108	90	70
Chicago to Lynchburg	72	62	47

	Sugar.	Molasses.	Coffee.	Rice.
New Orleans to Lynchburg.....	32	26	40	32
New Orleans to Danville.....	43	37	51	42

Tobacco rates to Louisville:

From Richmond	24
From Lynchburg	24
From Danville	40

It was shown that the Southern did not share in the competitive through rate from the west to Lynchburg, Richmond, and Norfolk, charged by the other carriers. The water competition from New Orleans was shown to have a direct effect upon rates to Norfolk and Richmond.

The defense was the usual one, that active competition created a dissimilarity of circumstances which excused the carrier for charging more for the short than the long haul. The court held that the evidence showed that the low rates to Lynchburg and Richmond were due to active legitimate competition, and that the local rates charged by the Southern from Lynchburg to Danville were not *per se* unreasonable. *Interstate Com. Co. v. Southern Railroad*, 122 Fed. Rep. 800 (C. C. A., 4th Circuit, May, 1903), affirming 117 Fed. Rep. 741.

La Grange Cases.— Where a lower rate is given to a point on the carrier's line as a result of competition, the making of such rate does not violate the long-and-short haul clause of the Interstate Commerce Act. The carrier, in order to give a particular point the benefit of proximity to a competitive point, may take into consideration the rate at the point of competition as a basis of rates to the point in question. *Interstate Com. Co. v. Louisville Railroad*, 190 U. S. 273.

The carrier charged less for freight shipped through from New Orleans to Atlanta, the longer distance point, than was charged, in the same direction, from New Orleans to La Grange, Hogansville, Newman, Palmetto, and Fairburn. The carrier made the rates from New Orleans to La Grange by taking the rate from New Orleans through to Atlanta and adding thereto the local rate from Atlanta back to La Grange. This rule was enforced as to stations between La Grange and Atlanta, to-wit, Hogansville, Newman, Palmetto, and Fairburn. *Held*, that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta. That this competition created a dissimilarity of circumstances which justified lesser charges for carriage of freight from New Orleans to La Grange and the shorter distance points. *Ib.*

Held further, that where the ruling that the rate to the nearer points was in violation of the Interstate Commerce Act

was based on an error of law, it was not proper to conclude the question of the inherent unreasonableness of rates, but to leave it open for future action by the Commission. *Ib.*

Social Circle Case.— The Georgia Railroad Company controlled a line of road across the State of Georgia extending from



TERRITORY, MILEAGE AND DISTANCES IN SOCIAL CIRCLE CASE.

the city of Atlanta to the city of Augusta, a distance of 171 miles, both terminals being in the State of Georgia, the entire road being within that State. Social Circle is a point on its line, 52 miles east of Atlanta and 119 miles west of Augusta. The Georgia road, by arrangement with the Western Atlantic railroad, extending from Atlanta, its western terminal, to Chat-

tanooga, Tenn., and with the Cincinnati, New Orleans and Texas Pacific, extending from Chattanooga to Cincinnati, Ohio, was enabled to make through bills of lading on goods shipped from Cincinnati to points on its own line from Atlanta to Augusta, on the Savannah river, the eastern boundary of the State of Georgia. The entire distance over these three roads from Cincinnati through Chattanooga, and through Atlanta to Augusta, the farthest terminal, was 645 miles. The distance from Cincinnati to Atlanta was about 474 miles, and from Atlanta to Augusta, over the Georgia road, the distance was about 171 miles.

Merchants in Cincinnati, on goods shipped from that city, were charged the same rate of freight, whether the merchandise was shipped to Atlanta, a distance of 474 miles, or to Augusta, a distance of 645 miles. On goods, however, which were shipped from Cincinnati to Social Circle, a distance of 526 miles, the freight charged was 30 cents per 100 pounds more than was charged for shipping the same kind of merchandise either to Atlanta or to Augusta. The through rate from Cincinnati to Atlanta or Augusta was \$1.07 per 100 pounds. The through rate from Cincinnati to Social Circle was \$1.37 per 100 pounds. The division of the tariff on these rates, on through bills at \$1.07 per 100 pounds, was as follows: To the Cincinnati and Texas Pacific, 55 ⁷/₁₀ cents; to the Western and Atlantic, 22 ⁹/₁₀ cents; to the Georgia railroad, 28 ⁴/₁₀ cents. On the Social Circle rate of \$1.37 per 100, the division was as follows: To the Cincinnati and Texas Pacific, 75 ⁹/₁₀ cents; to the Western Atlantic, 31 ¹/₁₀ cents; to the Georgia, 30 cents. This rate of 30 cents per 100 was the local rate which the Georgia road charged on local freight carried by it from Atlanta to Social Circle. It will be observed that the rate from Cincinnati to Social Circle was made by adding to the through rate to Augusta of \$1.07, the local rate of 30 cents from Atlanta to Social Circle.

Cincinnati merchants manufacturing buggies consigned by them from Cincinnati to Atlanta, Augusta, Social Circle, and other points in the State of Georgia, filed a complaint before the Interstate Commerce Commission against the three railroads above named, alleging that they were common carriers

"under a common control, management, or arrangement for continuous carriage or shipment" from Cincinnati to points in the State of Georgia. They alleged that the rates charged by defendants were in violation of section 4 of the Interstate Commerce Act, in that defendants charged more for carrying goods from Cincinnati to Social Circle, a distance of 526 miles, than they charged for goods shipped from Cincinnati to Augusta, a distance of 645 miles, under similar circumstances and conditions. They claimed that defendants had no right to charge more for the shorter than for the longer haul in the same direction. Testimony was taken before the Commission which resulted in an order commanding the defendants to cease and desist from making any greater charge in the aggregate on freight of the same class, carried from Cincinnati to Social Circle, than charged on such freight from Cincinnati to Augusta. The order was disobeyed, and an action was brought by the Commission in the United States Circuit Court to enforce it. The bill was dismissed, but on appeal the Circuit Court of Appeals reversed the decree and remanded the case, with instructions to enter a decree in favor of the Commission against the defendants as prayed for. (64 Fed. Rep. 981.)

Upon an appeal to the Supreme Court of the United States the decree of the Circuit Court of Appeals was affirmed. The court held that although the Georgia railroad operated its line wholly within one State, it became subject to the provisions of the Interstate Commerce Act by entering into an arrangement for continuous carriage or shipment from points in other States to points in the State of Georgia; thereby, its road became part of a continuous line from Cincinnati, Ohio, to Augusta, Ga. The Circuit Court of Appeals, by its decree, enjoined and restrained the defendants to cease and desist from making any greater charge in the aggregate on freight of the first class carried from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta, and directed defendants to pay \$100 per day for each day that they should fail not to do so, within five days after the entry of the decree. The Supreme Court further held that it was within the jurisdiction of the Commission to consider whether defendants, in charging a higher rate for a shorter than for a longer distance,

were, or were not, transporting property in transit between the States under "substantially similar circumstances and conditions." That the question was one of fact peculiarly within the province of the Commission, whose conclusions were accepted and approved by the Circuit Court of Appeals. That the record disclosed nothing which made it the duty of the Supreme Court of the United States to draw a different conclusion. (March, 1896.) *Cincinnati & New Orleans Railroad v. Interstate Com. Co.*, 162 U. S. 184; *Interstate Com. Co. v. Cincinnati & New Orleans Railroad*, 162 U. S. 184.

Ocean Competition — Foreign Traffic.—One of the most interesting and important controversies under the Interstate Commerce Act arose in March, 1889, upon an order made by the Interstate Commerce Commission directing that "imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

The carriers refused to comply with the order, and complaint was made to the Commission by the New York Board of Trade and Transportation, the Commercial Exchange of Philadelphia, and the San Francisco Chamber of Commerce, alleging that the order of the Commission was being violated. That regular tariff rates were charged on property delivered to the carrier at New York and Philadelphia, for transportation to Chicago and other western points. On property delivered to the carrier at New York or Philadelphia from vessels and steamships on bills of lading from London, Liverpool, and other foreign ports for carriage to Chicago and the west, the rates charged were much less, and in some cases more than 50 per cent. less, for a like and contemporaneous service under substantially similar circumstances and conditions. That the railroad companies' share of each through rate was lower than their regular tariff rates.

The Commission, on the pleadings and evidence, made an order directing the carriers to cease and desist from charging more on domestic shipments than was charged for carrying foreign shipments, on through bills of lading, from foreign

ports. The carriers refused to obey the order, and suit was brought by the Commission in the Circuit Court of the United States for the southern district of New York to enforce it.

At circuit, a decree was entered directing defendants to comply with the order of the Commission, which decree was affirmed in the Court of Appeals. On appeal to the Supreme Court of the United States, the decree was reversed (FULLER, C. J., HARLAN and BROWN, JJ., dissenting).

The majority of the Supreme Court held that the similar circumstances and conditions referred to in the Interstate Commerce Act are not circumstances and conditions which are confined necessarily to those operating carrying lines or conducting railway transportation and traffic within the field occupied by the carrier. That under certain circumstances, the Commission should take into consideration competitive conditions arising outside of its jurisdiction entirely. The majority of the court held, broadly, that ocean competition arising beyond the seaboard of the United States should be considered as constituting dissimilar conditions which would justify and excuse a difference in charges in rates between export and domestic traffic. (March, 1896.) *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

The San Francisco Chamber of Commerce, which intervened in the case, showed, in addition to the evidence adduced by the New York and Philadelphia merchants, that the Texas Pacific and Southern Pacific railroads carried goods from New Orleans to San Francisco, which had been shipped on through bills of lading from London and Liverpool, for which it charged less rates than it charged for carrying American goods from New Orleans to San Francisco. On this branch of the case it was strongly urged that under the Interstate Commerce Act the carrier was forbidden to charge American shippers more for carrying goods from New Orleans to San Francisco than it charged English shippers for the same service. That the act, in express terms, forbade the carrier to charge one shipper more than another for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic "under substantially similar circumstances and conditions." Defendants claimed that American merchants purchasing goods

in England negotiated through rates from London and Liverpool to San Francisco, and that these rates were governed by the competition of sailing vessels for the entire distance; by steamships and sailing vessels, in connection with railroads, across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these, under through arrangements, to San Francisco. That defendants were obliged to compete for the foreign business, and unless it charged the rates complained of, it would lose the business. That no prejudice resulted to New Orleans for the alleged reason that if defendants could not compete for the business, the traffic would move *via* other routes without benefit to New Orleans, and that compliance with the order would injuriously affect defendant's business to points in Texas, and on the Missouri.

The main question presented was whether the Commission, under the act, could consider ocean competition as constituting dissimilar conditions, or whether the carriers were bound by the act to confine competitive conditions within the field occupied by the carrier, and not competitive conditions arising outside of it, and thus discriminate against American merchants transporting American commodities.

The court ruled that outside competitive conditions, though not in terms referred to in the statute, could be taken into consideration in ascertaining the meaning of the phrase in sections 2 and 4 of the act "under substantially similar circumstances and conditions." This conclusion resulted in a reversal of the decree of the Circuit Court of Appeals. The opinion for reversal was written by Justice SHIRAS, with whom Justices FIELD, GRAY, BREWER, WHITE, and PECKHAM concurred. *Ib.*

Ocean Competition — Dissenting Opinions.— In view of the fact that the contention of the shippers, and of the Interstate Commerce Commission in the above case was sustained at circuit, enjoining the carriers from disobeying the order of the Commission, and that this decree was affirmed by the Court of Appeals, second circuit, and that three of the nine justices in the Supreme Court dissented from the conclusions arrived at in the prevailing opinion, the views entertained by a

minority of the court are of interest to shippers and commercial bodies throughout the country. These views sustained the contention not only of the Interstate Commerce Commission, but of Chambers of Commerce and other commercial bodies throughout the country. The questions discussed by the court were questions of law, as they involved the construction and interpretation of an act of Congress. But they also involve questions of economic science upon which widely-diverse opinions are entertained. Mr. Justice HARLAN wrote in support of the views contended for by the shippers, with whom Mr. Justice BROWN concurred. Chief Justice FULLER dissented also from the majority of his brethren on the ground that the "similar circumstances and conditions" referred to in the Interstate Commerce Act were such as arose within the field occupied by the carrier, "and not competitive conditions arising wholly outside of it." The opinion of Mr. Justice HARLAN is, in part, as follows:

"Mr. Justice HARLAN, with whom concurred Mr. Justice BROWN, dissenting.

* * * * *

"The record shows that the rate in cents per 100 pounds charged for the transportation, on through bills of lading, of books, buttons, carpets, clothing, and hosiery, from Liverpool and London, *via* New Orleans, over the Texas and Pacific Railway and the railroads of the Southern Pacific system, to San Francisco, is 107, while upon the same kind of articles — carried, it may be, *on the same train* — the rate charged from New Orleans, *over the same railroads*, to San Francisco is 288. The rate in cents per 100 pounds charged for the transportation, on through bills of lading, of boots and shoes, cashmeres, cigars, confectionery, cutlery, gloves, hats and caps, laces, linen, linen goods, saddlers' goods, and woolen goods, from Liverpool and London, *via* New Orleans, over the same railroad, to San Francisco, is 107, while upon like goods, starting from New Orleans and destined for San Francisco, over the same line — it may be *on the same train* — the rate charged is 370. Discrimination in the matter of rates is also made by the railway company (though not to so great an extent) in favor of blacking, burlaps, candles, cement, chinaware, cordage, crockery, common drugs, earthenware, common glassware, glycerine, hardware, leather, nails, soap, caustic soda,

tallow, tin plate, and wood pulp, manufactured abroad and shipped, on through bills of lading, from Liverpool and London, via New Orleans, to San Francisco, and against goods of like kind carried from New Orleans to San Francisco over the same railroads.

“These rates have been established by agreement between the railway company whose line, with its connections, extends from New Orleans to San Francisco, and the companies whose vessels run from Liverpool to New Orleans. And the question is presented, whether the Texas and Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco, than for the transportation between the same places, of goods of the same kind in all the elements of bulk, weight, value, and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices — and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise, and labor, is consistent with the act of Congress, then the title of that act should have been one to regulate commerce to the injury of American interests and for the benefit of foreign manufacturers and dealers.

“The railway company insists that the competition existing between it and the ocean lines running between Liverpool and San Francisco, *via* Cape Horn and the Pacific ocean, and between Liverpool and San Francisco, *via* the Isthmus of Panama, compel it to charge a higher rate from New Orleans to San Francisco for the transportation of goods originating at New Orleans than on like goods originating at Liverpool and destined to San Francisco, *via* New Orleans; otherwise, it contends, goods that originate at Liverpool would fall into the hands of its competitors in the business of transportation. The Interstate Commerce Commission held that, in determining the question before it, no weight could be attached to the circumstances arising from the conduct of ocean lines by corporations or associations who were in nowise subject to the provisions of the act of Congress; and that the provision which expressly forbids common carriers from making or giving undue preferences or advantages in any respect whatsoever was intended to be so far rigid in its nature that it could not be relaxed by reason of circumstances or conditions arising out of or connected with foreign countries or that were caused by agencies beyond the

control or supervision of the Commission. The court now holds that the Commission erred in thus interpreting the act of Congress.

* * * * *

“I am unwilling to impute to Congress the purpose to permit a railroad company, because of arrangements it may make, for its benefit, with foreign companies engaged in ocean transportation, to charge for transporting from one point to another point in this country goods of a particular kind manufactured in this country three or four times more than it charges for carrying, over the same route and between the same points, goods of the same kind manufactured abroad and received by such railroad company at one of our ports of entry.

“The fourth section of the statute relating to long and short distances, and which authorizes the Commission, in special cases, to allow less to be charged for longer than for shorter distances for the transportation of passengers or property over the same route, does not refer to distances covered and services performed on the ocean between this country and foreign countries not adjacent to this country, nor to transportation between the same points in this country over the same road. When the question is as to rates for service by a carrier between two given points in this country, and in reference to the same kind of property, Congress, I think, intended that for such ‘like and contemporaneous service,’ performed, as they necessarily are, under the same circumstances and conditions, no preference or advantage should be given to any particular person, company, firm, corporation, or locality. Consequently, when goods are to be carried from one point in the United States to another, the rate to be charged cannot properly be affected by an inquiry as to where such goods originated or were manufactured.

“Congress intended that all property transported by a carrier subject to the provisions of the act should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over its line, between the same points, without discrimination based upon conditions and circumstances arising out of that carrier’s relations with other carriers or companies, especially those who cannot be controlled by the laws of the United States.

“After referring to the fact that goods originating in a foreign country are carried upon rates that are practically fixed abroad, and are not published here, while carriers governed by the act of Congress are required to publish their rates for transportation in this country, the Commission, speaking by Commissioner

Bragg, well said: 'Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which it is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preferences must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the act to regulate commerce, which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line.' I concur entirely with the commission when it further declared: 'One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute. Such a deprivation would be so obviously unjust as to shock the general sense of justice of all the people of the country, except the few who would receive the immediate and direct benefit of it.'

"It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight, originating in Europe or Asia and transported by an American railway from an American port to another part of the United States, could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country and passing over the same line of railroad between the same points. To say that Congress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation, the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the Interstate Commerce Act would be displaced by a rule practically established in foreign countries by foreign companies, acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

"I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, or those who may be supplied from that city, have no concern whether the goods reach them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama.

"Nor is the question before the court controlled by considerations arising out of the tariff enactments of Congress. The question is one of unjust discrimination by an American railway against shippers and owners of goods and merchandise originating in this country, and of favoritism to shippers and owners of goods and merchandise originating in foreign countries. If

the position of the Texas and Pacific Railway Company be sustained, then all the railroads of the country that extend inland from either the Atlantic or the Pacific ocean will follow their example, with the inevitable result that the goods and products of foreign countries, because alone of their foreign origin and the low rates of ocean transportation, will be transported inland from the points where they reach this country at rates so much lower than is accorded to American goods and products, that the owners of foreign goods and products may control the markets of this country to the serious detriment of vast interests that have grown up here, and in the protection of which, against unjust discrimination, all of our people are deeply concerned.

* * * * *

“Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry, whether the carrier has been guilty of unjust discrimination, shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared nor can I suppose it will ever distinctly declare that an American railway company, in order to secure for itself a particular business and realize a profit therefrom, may burden interstate commerce in articles originating in this country, by imposing higher rates for the transportation of such articles from one point to another point in the United States, than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. *Does any one suppose that, if the interstate commerce bill, as originally presented, had declared, in express terms, that an American railroad company might charge more for the transportation of American freight, between two given places in this country, than it charged for foreign freight, between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American president would have approved such legislation?*

“Suppose the interstate commerce bill, as originally reported, or when put upon its passage, had contained this clause: ‘Provided, however, the carrier may charge less for transporting from an American port to any place in the United States, freight received by it from Europe on a through bill of lading, than it

charges for American freight carried from that port to the same place for which the foreign freight is destined.' No one would expect such a bill to pass an American Congress. If not, we should declare that Congress never intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

"Let us suppose the case of two lots of freight being at New Orleans, both destined for San Francisco over the Texas and Pacific railway and its connecting lines. One lot consists of goods manufactured in this country; the other, of goods of like kind manufactured in Europe, and which came from Europe on a through bill of lading. Let us suppose, also, the case of two passengers being at New Orleans — the act of Congress applies equally to passengers and freight — both destined for San Francisco over the same railroad and its connecting lines. One is an American; the other, a foreigner who came from Europe upon an ocean steamer belonging to a foreign company that had an arrangement with the Texas and Pacific Railway Company, by which a passenger, with a through ticket from Liverpool, would be charged less for transportation from New Orleans to San Francisco than it charged an American going from New Orleans to San Francisco. The contention of the railroad company is, that it may carry European freight and passengers, between two given points in this country, at lower rates than it exacts for carrying American freight and passengers between the same points, and yet not violate the statute, which declares it to be unjust discrimination for any carrier, directly or indirectly, by any device, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. And that discrimination is justified upon the ground that, otherwise, the railroad company will lose a particular traffic. Under existing legislation, such an interpretation of the act of Congress enables the great railroad corporations of this country to place American travelers, in their own country, as well as American interests of incalculable value, at the mercy of foreign capital and foreign combinations — a result never contemplated by the legislative branch of the government.

"I cannot accept this view, and, therefore, dissent from the opinion and judgment of the court.

"I am authorized by Mr. Justice BROWN to say that he concurs in this opinion."

Mr. Chief Justice FULLER dissenting:

"In my judgment the second and third sections of the Interstate Commerce Act are rigid rules of action, binding the Commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the Commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

"I am, therefore, constrained to dissent from the opinion and judgment of the court."

Excessive Charges not Justified to Enable Carrier to Pay Expenses.— A trunk line of railroad frequently finds it expedient to construct divisions and branch lines to occupy and preempt certain territory, and forestall possible action by a rival carrier. It frequently happens that branch roads, considered as branches, do not pay expenses. This fact cannot justify unjust and unreasonable rates or undue discrimination in rates. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

Defendants sought to justify excessive rates on the sole ground that the branch did not pay, and defendants desired to use it to build up a rival port at Pensacola at the expense of a port at Savannah. The court *held*, that the carrier had no right to fix rates which were actually prohibitory to traffic in one direction without regard to the wishes of the shippers, or the fair opportunity of a community thus prejudiced to promote its commercial prosperity. Discrimination made for the purpose of promoting the interests of the carrier are subservient to the interests of the public and the principles of justice sought to be obtained by the Interstate Commerce Act. While the carrier has a right to exact a fair return for the public utilities it affords, the public interest requires that no more shall be paid by the public for the use of such utilities than the services rendered are reasonably worth. Where there is an irreconcilable conflict between the interest of the carrier and the interest of the public, the latter must prevail. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

"It cannot be admitted," says HARLAN, J., "that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interest and ignore the rights of the public." *Smyth v. Ames*, 169 U. S. 544.

"The public cannot properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends. * * * If a corporation cannot maintain such a highway and earn dividends for stockholders, it is unfortunate for it, and the misfortune is one which the Constitution does not require to be remedied by imposing unjust burdens upon the public." *Railroad Company v. Sandford*, 164 U. S. 567.

Evidence — Comparison of Rates, not Sufficient.—A finding by the Commission in a long-and-short-haul case, that rates to a particular point (Hampton, Fla.), are *per se* unreasonable, cannot be sustained on evidence based merely on the fact that such rates are too high as compared with rates from the same initial points (St. Louis, Nashville, and Chattanooga), to Palatka and Jacksonville, Fla., points other than the terminal point complained of, to-wit, Hampton, Fla., a shorter distance. *Interstate Com. Co. v. Nashville Railroad*, 120 Fed. Rep. 934, affirming court below (February, 1903, C. C. A., 5th Circuit).

The court said in above case: "It is charged as a duty of the Georgia, Florida and Southern railroad, the terminal carrier, to make such rates to Hampton and Palatka as will enable the Hampton merchants to compete in Palatka with Palatka merchants dealing in western goods, but it must not be forgotten that the rates to Palatka, which is a competitive point, are made by other carriers with through lines, who are not parties to this suit. The fallacy involved is that Hampton, which is an inland place with no natural advantages, shall be put upon the same footing as Palatka, which is situated upon a navigable stream all the year round, and has, in addition, several through railroad connections. *Ib.*

Joint Traffic Defined — Connecting Lines, Long and Short Haul.—A shipper sued the carrier in an action at law to recover damages for being charged more for a short haul than was charged other shippers for a long haul to the same point

of destination. He claimed that the charge was unlawful under the fourth section of the act. Plaintiff had a verdict which was reversed for errors of law. (October, 1892, C. C. A.) *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912.

In its opinion the Court of Appeals held that the Circuit Court erred in its interpretation of the long-and-short-haul clause as affecting joint or through rates on connecting lines. The court observed that where two companies own connecting lines and unite in making a joint through tariff, they form for the connecting roads practically a new and independent line. But such joint rate is not compulsory, and if roads do not choose to make such through rates, they cannot be compelled to do so, but each may insist on charging its local rate for all transportation over its line. But if a joint tariff is agreed upon, it does not form the basis by which the reasonableness of the local tariff of either line is determined. The court then proceeds to illustrate this proposition in regard to the "long-and-short-haul" clause under section 4, using Buffalo and Cleveland for the purpose. "We do not mean to intimate," said the court, "that the two companies with a joint line can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when two companies, by their joint tariff, make a new and independent line, that new line may become subject to the long-and-short-haul clause. What we decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned." *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912.

A joint tariff does not bind road to road, in the sense that the two are used or operated by either corporation.

There is neither unity of ownership nor unity of operation, but only a singleness of charge and a continuity of transportation over connecting roads. *Ib.*

See also *Tozer v. United States*, 52 Fed. Rep. 917.

Cartage, when not a Terminal Charge.— Cartage is not, as a rule, a terminal charge. Free cartage furnished to shippers in one locality and not in another is not necessarily a violation

of section 4 of the Interstate Commerce Act unless treated as a terminal charge and published as such in its schedules, or directed to be so published by an order of the Interstate Commerce Commission. *Interstate Com. Co. v. Detroit Railway*, 167 U. S. 633.

Long and Short Haul — Mode of Fixing Rates.—After a full hearing and investigation, the Interstate Commerce Commission made an order directing the defendant carriers to cease and desist from enforcing certain rates, charging more for a short than for a long haul, the points being from Cincinnati to Chattanooga, Atlanta, and intermediate points. The carriers refused to obey the order, and the Commission brought suit in the Circuit Court to secure an injunction to restrain the carriers from enforcing the rates which the Commission found to be unlawful. The court dismissed the bill. The Court of Appeals affirmed the decree.

The court observed "in fixing the rates to these intermediate points, the through rate to that competitive point which, combined with the local rate from the competitive point to the point of destination, will give the lowest through rate to the noncompetitive point controls. As the noncompetitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points, and as the carriage of the competitive traffic to the respective points is remunerative to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the noncompetitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate making."

The Supreme Court *held*, however, that an error of law had been committed in the interpretation given by the Commission in making its order as to the rule laid down in *Louisville Railroad v. Behlmer*, 175 U. S. 648. In respect to this rule, the court *held*, that when a violation of the long-and-short-haul clause of the Interstate Commerce Act is charged, competition is one of the elements which enter into the determination as to whether or not the conditions are similar. If a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.

For these reasons the Supreme Court modified the decree of the Court of Appeals (reported in 93 Fed. Rep. 83), and directed that the dismissal of the bills be modified without prejudice to the right of the Interstate Commerce Commission, if it so elects to make an original investigation of the questions contained in the record pertinent to the complaints presented by that body, and as modified decree affirmed. *Interstate Com. Co. v. Western Railroad*, 181 U. S. 29; *Interstate Com. Co. v. Clyde SS. Co.*, 181 U. S. 29.

Carrier Need not Apply to Commission to Fix Rates.—A carrier in making a tariff rate may judge in the first instance as to whether, in prescribing a greater charge for a short than for a long haul, the circumstances and conditions are or are not “substantially similar.” He is not obliged to seek an investigation by the Interstate Commerce Commission as to whether circumstances and conditions justify the rate. But in fixing the rate, the carrier does so at its peril subject to liability under the act if it should be afterward adjudicated that the charge so fixed is unlawful. *Interstate Com. Co. v. Atcheson*, 50 Fed. Rep. 295.

Damages — Long and Short Haul.—A shipper who is injured by reason of the fact that he was not given the same rate for the shorter haul than was charged other shippers for the longer haul may bring an action at law against the carrier. If he is entitled to recover the measure of damages will be the difference between the amount which plaintiff was obliged to pay and the lesser rate shown to have been paid by other shippers for like services. (June, 1891, Cir. Ct. So. Dist. Iowa.) *Junod v. Chicago Railroad*, 47 Fed. Rep. 290.

Plaintiff claimed that he was charged more by defendant for carrying grain to Chicago from Carroll, Iowa, than was charged by defendant to shippers transporting grain from Blair, Neb., to Chicago. It was alleged that plaintiff was obliged to pay 19 cents per 100 pounds from Carroll to Chicago, while shippers in Blair, Neb., were charged for the same service 11 cents per 100 on grain shipped by them to Chicago. That the distance from Blair to Chicago is much farther than from Carroll to Chicago. The court charged the jury that if they

found a verdict for plaintiff they might, in their discretion, add interest, but the interest must be computed from the date of the last shipment made by plaintiff. *Ib.*

§ 5. Pools and Combinations Prohibited.—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Object and Scope of Section 5.— The object of this section of the act is to prevent agreements among carriers which will operate to shut out competition. Competing lines of carriers throughout the country are forbidden to combine their business, and divide the profits of the pool among themselves. If such combinations were permitted, it is claimed the shipper and consumer would be practically at the mercy of one carrier operating the various connecting lines of railroad as constituent companies in the common interest. Such a merger or combination would operate to destroy competition and restrain trade and commerce to such an extent that commerce would be practically controlled by the carrier, who could, through secret agencies, also become the producer and shipper. Notwithstanding the stringent provisions of section 5, combinations in restraint of trade became so formidable that on July 2, 1890. Congress passed the Sherman Act, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." The provisions of the act were made universal in their application to reach the heart of the evil sought to be remedied. It declares that "every contract" in restraint of trade or commerce is unlawful. It is immaterial, therefore, whether such

a contract, if it affects interstate commerce, is made with the carrier, shipper, manufacturer, or producer. The contract, if it restrains trade and commerce, is unlawful. The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of section 5 so as to embrace not only carriers, but manufacturers and producers as well.

The Interstate Commerce Act and the Sherman Act are not repugnant to each other. The Supreme Court of the United States has held that both acts must stand (October, 1898, *United States v. Joint Traffic Association*, 171 U. S. 505), and must be construed as harmonious legislation. *Merger Cases* — *Northern Securities Company v. United States*, 193 U. S. 197. (March, 1904.)

Pooling Defined.— The statute contemplates two methods of pooling, both of which are prohibited. First, a physical pool, which means a distribution of property by the carrier offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and secondly, a money pool, which is described best in the language of the statute "to divide between them [different and competing railroads] the aggregate or net proceeds of the earnings of such railroads or any portion thereof." The words "any common carrier," as used in the act, means carriers engaged in interstate commerce. *In re Pooling Freights*, 115 Fed. Rep. 588 (May, 1902, Dist. Ct. West. Dist. Tenn.).

Pooling Agreements Unlawful.— Congress has power, in legislating upon interstate commerce, to declare that no contract, agreement, or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. *United States v. Joint Traffic Assn.*, 171 U. S. 505; *United States v. Trans-Missouri Freight Assn.*, 116 U. S. 290; *Northern Securities Company v. United States*, 193 U. S. 197.

In the *Joint Traffic* cases it appeared that thirty-one railroad companies, engaged in interstate commerce between Chicago and the Atlantic coast, made a joint traffic agreement, and entered into articles of association with respect to the regulation of

rates, fares, and charges, and the rules applicable thereto, governing competitive traffic (with certain specific exceptions) which passed through the western *termini* of the trunk lines of the respective roads operated by the members of the association, and such other points as might be thereafter designated by the managers. The agreement was drawn for the purpose of avoiding the objections to the validity of a similar agreement, which was declared void by the court in the *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

The agreement declared expressly that it was made to aid in fulfilling the purposes of the Interstate Commerce Act, and to co-operate with the respective parties and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic; to prevent unjust discrimination, and to secure the reduction and contraction of agencies, and the introduction of economies in the conduct of freight and passenger service.

A bill was filed on behalf of the United States in the southern district of New York for the purpose of obtaining an adjudication that the agreement in question was unlawful in restraint of trade, and in violation of the provisions of the Interstate Commerce Act, and of the Sherman Act, and to restrain and enjoin its further execution. The government claimed that although the agreement professed in terms to aid and fulfil the purposes of the Interstate Commerce Act, yet its direct and immediate results would operate to defeat the object and purposes of the act, create a monopoly, and stifle competition; that it was in direct violation of section 5 of the act, which in terms forbids common carriers to pool freights of different and competing roads, or to divide the aggregate net proceeds of the earnings of such roads, or any portion thereof, and making such pooling agreements an offense under the act. The court below dismissed the bill and its judgment was affirmed in the Circuit Court of Appeals. The judgment was reversed in the Supreme Court and the case remanded for further proceedings. The Supreme Court held that there was no legal distinction between the agreement of the Joint Traffic Association, then before the court, and the agreement in the *Trans-Missouri* case. That the agreement was in restraint of trade and commerce and was

clearly in violation of the provisions of the Sherman Act (October, 1898). *United States v. Joint Traffic Assn.*, 171 U. S. 505.

The court observed, among other things in pointing out the illegality of the agreement, that under it the managers of the association may from time to time recommend changes in rates and a failure to observe the recommendation would be a violation of the agreement and would subject the offender to a fine not exceeding \$5,000. If one member should be allowed to fix its own rates and be guided by them, as to that company the agreement might as well be rescinded. No such result was contemplated. In order to prevent not only secret competition, but to prevent any competition at all, provision is made for prompt action by the managers of the association, under which the latter is given power to enforce uniformity of rates against the offending company, upon pain of an open, rigorous, and relentless war of competition against it on the part of the whole association. *Ib.*

The natural, direct, and immediate effect of competition is to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce. And an agreement whose first and direct effect is to prevent this play of competition restrains instead of promotes trade and commerce. *Ib.*

The agreement entered into by the combination known as the Trans-Missouri Freight Association made no provision for pooling freights or dividing the aggregate net proceeds. It was an agreement to fix and maintain uniform rates among competing lines engaged in interstate commerce, with penalties to be imposed upon its members for a violation of its rules. The court held that, as there was no agreement to pool freights or divide the aggregate net proceeds, the agreement complained of was not one forbidden by the Interstate Commerce Act or by section 5 of that act forbidding such pooling arrangements, but that the agreement being one to prevent competition and furnish rate cutting it was in violation of the Sherman Anti-Trust Act. (Act approved July 2, 1890.) *United States v. Freight Assn.*, 166 U. S. 290 (March, 1897).

The court held further, that the Sherman Act embraced *every* contract or conspiracy in restraint of interstate trade or commerce, whether made by common carriers engaged in transportation or by persons or corporations engaged in the manufacture,

purchase, and sale of commodities. The court held further that if it appeared that the contract or combination complained of was in restraint of interstate or foreign commerce it was condemned by the statute without regard to whether such agreement or combination was or was not reasonable. *Ib.*

Status of the Court in the Freight Cases.— In both of the cases above referred to the court was not unanimous. In both the prevailing opinion was written by Mr. Justice PECKHAM. The earlier (the *Trans-Missouri* case) was argued December 8, 1896, and decided March 22, 1897. Chief Justice FULLER and Justices BREWER, BROWN, and HARLAN concurred with PECKHAM, J. Justices WHITE, FIELD, GRAY, and SHIRAS dissented.

In the later case of the Joint Traffic Association, which was argued February 24, 1898, and decided October 24, 1898, Chief Justice FULLER and Justices BREWER, BROWN, and HARLAN, concurred with PECKHAM, J. Justices SHIRAS, WHITE, and GRAY dissented. Justice MCKENNA took no part.

In the *Addystone Pipe* case (argued in April 26, 1899; decided, December 4, 1899), which did not relate to railroads but to manufacturers and dealers in pipe in which it was held that the agreement or combination was unlawful as in restraint of interstate commerce and in violation of the provisions of the Sherman Act, the decision was unanimous. The opinion of the court was written by Mr. Justice PECKHAM.

The Merger Case — Status of the Court.—The case of the *Northern Securities Company v. The United States* (193 U. S. 197), was decided March 14, 1904. It was brought under the Sherman Act to dissolve the securities company to which had been assigned, as a holding company, the stock of two corporations operating parallel competing lines of railroad under an agreement to permit the holding company, which did not own or operate a railroad, to control the operations of both competing lines. It was argued that the agreement was in restraint of trade and commerce and of the Constitution and statutes of States which created the merged corporations. The merger agreement was held to be illegal and in violation of the provisions of the Sherman Act. The court divided. The prevailing opinion was written by

Justice HARLAN, with whom Justices BROWN, DAY, and McKENNA concurred. Mr. Justice BREWER concurred in the result in an opinion in which he doubted whether *every* agreement in restraint of trade and commerce could be held to be illegal. Chief Justice FULLER and Justices WHITE, HOLMES, and PECKHAM dissented.

For a fuller review of these cases, see *post*, under section 1 of the Sherman Act.

Pooling — Contracts Relating to must be Produced — Coal Trust.— A proceeding was instituted before the Interstate Commerce Commission charging certain carriers engaged in the transportation of coal from mines in Pennsylvania to tide water and to different States. The allegations in the complaint were in substance that six railroad companies engaged in carrying coal were substantially parallel competing lines. That they entered into an agreement and combination to pool their freight traffic in anthracite, so as to divide the same between their different lines in agreed proportions in violation of section 5 of the act, and pooled their freight under the agreement.

In the course of the investigation the carriers and their agents were called upon to produce the contracts in evidence. The carriers refused on many grounds, among others that the evidence contained in the contracts might tend to incriminate the contracting parties. The Circuit Court sustained the objection solely on the ground that the contracts related only to the sale of coal in Pennsylvania, which was not a transaction embracing interstate commerce.

On appeal to the United States Supreme Court the lower court was reversed, the contracts were held to be relevant, and that the contracts must be marked in evidence.

Mr. Justice DAY, on this point, said: "It is argued that these contracts if given in evidence will tend to show a pooling of freights in violation of the fifth section of the Commerce Act. While this testimony may not establish such an agreement as is suggested it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads where by agreement or otherwise the companies have a common interest in the source from which it is obtained."

The court held also that the contracts were competent on the question as to the mode of fixing rates. "To unreasonably hamper the Commission by narrowing the field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purpose for which it was established by Congress." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

Pooling a Defense to an Equity Suit against Ticket Scalpers.

— The carrier sued a number of defendants engaged as ticket brokers who sold tickets issued by complainant in conjunction with other carriers at cut rates. The relief asked was an injunction to restrain defendants from selling the tickets. They were known as round-trip excursion tickets to the Pan-American Exposition, held at Buffalo in 1901. The defendants purchased these tickets at Buffalo and sold the unused return portions at reduced prices. The tickets were originally issued at special rates and were non-transferrable by the original purchaser.

Defendants pleaded that he who comes into equity must come with clean hands. That complainants in issuing the tickets originally did so under an agreement and combination with other carriers to create a monopoly in the sale of such tickets and to stifle competition, and bar all competitors not members of the associations under which complainant acted and of which it was a member, to-wit, the Trunk Line Association, also to subordinate bodies as the Trunk Line Committee acting through the Trunk Line Passenger Committee. It was charged that under the agreement its members made a *pro rata* division of all receipts, and that it was not only a pooling agreement forbidden by section 5 of the Interstate Commerce Act, but that it was also in violation of the Sherman Act.

The court sustained the defense and vacated the temporary injunction on the ground that as the act of complainant in issuing such tickets was unlawful and was the result of an agreement forbidden by statute, complainant could not invoke the aid of a court of equity to sustain it in the prosecution of such an unlawful agreement. *Delaware Railroad v. Frank*, 110 Fed. Rep. 689 (August, 1901, Cir. Ct. No. Dist. N. Y.).

§ 6. Schedule of Rates to be Published.— That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected.

Rates through Foreign Country.— Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any

freight shipped from the United States, through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

Notice of Advance or Reduction of Rates.— No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

Published Rate Only Legal Rate.— And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than

is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Documents to be Filed with Commission — Measure of Publicity.— Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

Notice of Advance or Reduction of Joint Rates — Commission may Publish Rates.— No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, ex-

cept after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

Deviation from Published Rate Unlawful.— It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

Form of Schedules.— The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Penalties for Failure to Publish Rates.— If any such common carrier shall neglect or refuse to file or publish its

schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act. (*As amended March 2, 1889.*)

§ 6. Supplemented by Elkins' Act of February 19, 1903.—
The matters embraced in section 6 of the Interstate Commerce Act was supplemented by an act of Congress, approved February

19, 1903, entitled "An Act to further regulate commerce with Foreign Nations and Among the States." The supplemental provisions of this statute, known as the Elkins Act, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, [Violation of Act a Misdemeanor] would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts [Penalty for Violation of Published Rate] to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation [Soliciting or Paying Rebate, Misdemeanor] to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier sub-

ject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, [~~Imprisonment Abolished~~] imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States [~~Jurisdiction of Federal Court~~] having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Act of Officer or Agent, Act of Carrier.— In construing and enforcing the provisions of this section the act, omis-

sion, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Published Rate when Conclusive — Parties.— § 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Adherence to Rate, how Enforced.— § 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic

between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several [U. S. District Attorney Must Prosecute at Request of Attorney-General] district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and

eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person [Immunity of Witnesses] shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions [Expedition under Act of February 11, 1903] of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

Repealer.— § 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed,

but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

§ 5. That this Act shall take effect from its passage.

Object and Scope of Section 6.— This section was designed to compel publicity on the part of the carrier as to all rates, fares, schedules, and tariffs charged by the carrier alone or in connection with other carriers, under a common arrangement for joint through rates over connecting lines. It may be designated as the publicity section of the act and is of the greatest importance to secure the protection and rights of all shippers. In the absence of the compulsory requirements of section 6 the shipper and the traveling public would be remediless in their efforts to secure uniform rates by reason of the difficulty which would arise in securing evidence of acts of discrimination in violation of the statute. Congress, by the provisions of section 6, designed that the carrier should have but one schedule of rates and tariffs which should be published and made easily accessible to every shipper and every person desirous of being transported on any line from a point in one State to his destination in another State. The published rate is the only lawful rate and the carrier can make no charge except such as is published. If it exacts less, or if it exacts more, the charge is unlawful and subjects the carrier to the pains and penalties of the act.

Failure to comply with the provisions of this section (as well as other requirements in other parts of the act) is punishable criminally, as prescribed in section 10 as amended by the Elkins Act, approved February 19, 1903.

The Elkins Act.— The act of February 19, 1903, known as the Elkins Act, supplements the provisions of section 6 and has been inserted here as part of that section. This supplemental legislation deals principally with the matters embraced in section 6 with respect to the publicity of tariff rates and charges. It relates also to the subject of rebates, drawbacks, and unjust discrimination, which practices are declared unlawful by sec-

tion 2 known as the anti-rebate section. Section 2 declares that it shall be unlawful for the carrier to receive or collect from any person a greater or less compensation than it charges or collects from any other persons for a like service. The Elkins Act declares that it shall be unlawful for the carrier or any person or persons or corporation "to offer, grant, or give or to solicit, accept, or receive any rebate." It is claimed that under the Elkins Act this language makes the shipper or person who solicits the rebate liable with the carrier who gives it.

As to the mode of proving that such rebate was given the published rate is deemed the legal rate and is conclusive evidence against the carrier. Proof that there has been a departure from the published rate "or any offer to depart therefrom" constitutes the offense of unjust discrimination. It will be observed that in order to make out a case it is no longer necessary to prove that the published rate has actually been departed from, or that the rebate or drawback has actually been paid or allowed to the shipper. It will be sufficient to show that the carrier "effered to depart" from the published rate, and proof of such "offer" will constitute a *prima facie* case under the statute. The Elkins Act in express terms makes the carrier corporation liable under the act as well as the officers, agents, and servants of the corporation.

Another important change wrought by the Elkins Act relates to the punishment prescribed by it and by the Interstate Commerce Act. Prior to its enactment the punishment incurred for a violation of the Interstate Commerce Act included both fine and imprisonment. The imprisonment feature has been eliminated and abolished by the Elkins Act. The maximum fine for unjust discrimination prescribed by the new law is \$20,000 and the minimum fine, \$1,000. Imprisonment can now be imposed only where the offender is adjudged guilty of a contempt of court for failure to comply with the provisions of a writ of *mandamus*, which may be issued to compel the carrier to comply with the provisions of section 6. The section declares expressly that failure to comply with the writ shall be punished as a contempt of court. This remedy is cumulative and is not affected by the pendency of criminal proceedings.

The Elkins Act also makes clear the jurisdiction in which in-

dictments may be found against persons proceeded against criminally for any violation of the Commerce Act, or of the Elkins Act, by declaring that such violation may be prosecuted "within the district in which such violation was committed, or through which the transportation may have been conducted." If an offense is begun in one district and completed in another, it may be dealt with in either jurisdiction.

A remedy by injunction is also provided to restrain carriers from receiving or transporting persons or property under section 1 until the provisions of section 6 have been complied with.

Mandamus to Compel Publication of Rates — Common Arrangement Defined.— Where carriers agree among themselves to transport property from one State to another over a number of lines, at a fixed through rate, and agree expressly or by implication to a division of the charges among the carriers, such an arrangement constitutes "a common arrangement for a continuous carriage or shipment," within the meaning of section 1 of the act. The terms of such an arrangement must be made public, and published pursuant to the provisions of section 6 and the performance of the requirements of that section may be enforced by a writ of mandamus issued by a Circuit Court of the United States as prescribed in section 6. *United States ex rel. Interstate Com. Co. v. Seaboard Railroad*, 82 Fed. Rep. 563 (July, 1897, Cir. Ct. So. Dist. Ala.).

Criminal Offense — Deviation from Published Rate, Liability of Receiver.— A violation of the provisions of section 6 of the act with respect to deviating from published joint tariff rates by suffering or permitting persons to obtain transportation for less than published rates is made a misdemeanor by section 10 of the act. Prior to February 19, 1903, the punishment prescribed was both fine and imprisonment. By the act of February 19, 1903, the fine was increased and so much of the statute as related to imprisonment was abolished.

An indictment against a receiver of a railroad for violating the provisions of section 6 with regard to deviating from published joint tariff rates was demurred to on the ground that a receiver, although included by the language of section 10, could not be held under an indictment charging a violation of section

6 for a deviation from a joint tariff rate, unless it was averred that the receiver, subsequent to his appointment, became a party to the tariff agreement or ratified, adopted, or recognized it in some way. The court sustained the demurrer on the ground that no person can be convicted of a crime in failing to keep an agreement unless he is under some obligation to keep it and to which he was not a party. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

See also *United States v. Tozer*, 39 Fed. Rep. 369 (June, 1889, Dist. Ct. East. Dist. Mo., N. D.); *Same v. Same*, 39 Fed. Rep. 904 (September, 1889, Dist. Ct. East. Dist. Mo. N. D.).

Penalties — Imprisonment Abolished.— The penalties for a violation of section 6 are provided for in section 10 of the act, except that section 6 specifically declares that *in addition* to other penalties prescribed, a common carrier, who neglects or refuses to file or publish a schedule of the tariffs of rates, fares, and charges in accordance with section 6, shall be subject to a writ of *mandamus* to be issued by any Circuit Court of the United States in the judicial district where the principal office of the common carrier is situated or where the violation of the act was committed. The *additional* penalty attaches in case the writ is not obeyed by the carrier, who may then be punished as for a contempt of court, which would subject the offender to imprisonment until he purged himself of the contempt. The evident intention of Congress was that in case criminal proceedings were instituted against the carrier, all the civil remedies in favor of shippers should remain in full force and virtue, notwithstanding the pendency of such criminal proceedings.

Prior to the 19th day of February, 1903, a violation of the provisions of section 6 was punishable under section 10 by a fine not to exceed \$5,000, except when the offense charged was unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, in which case the offender was liable *in addition* to the fine to be imprisoned in the penitentiary for a term not exceeding two years or both such fine and imprisonment. On the 19th day of February, 1903, the Elkins Act was approved and became operative. Under and by virtue of this law, which supplements section 6 of the Interstate

Commerce Act, the carrier corporation becomes liable for a violation of the provisions of section 6 as well as any officer of the corporation. The penalty prescribed for willful failure to publish tariff rates and charges, is declared to be a fine of not less than \$1,000 or more than \$20,000 for each offense. The Elkins Act also abolishes imprisonment as a penalty for a violation of any of the provisions of the Interstate Commerce Act, and declares that in all convictions under the act, whether committed before or after the passage of the Elkins Act, no penalty shall be imposed on the convicted party, other than the fine prescribed by law, "imprisonment wherever now prescribed as part of the penalty being hereby abolished."

There has been considerable discussion as to the wisdom of abolishing the penalty of imprisonment for violations of the Interstate Commerce Act. It seems clear that the fine imposed by the Elkins Act, for failure to comply with the provisions of section 6, which may be as great as \$20,000 for each offense, has not served to deter carriers from violating the spirit and letter of the law. The Interstate Commerce Commission, in its annual report for the year 1903, gives a schedule of litigation pending against carriers for violations of the act. This schedule comprises some thirty cases remaining undisposed of on December 15, 1903. Of these one-half were brought to enjoin carriers from departing from the published tariff rates. In other words the list shows that fifteen actions and proceedings of a civil nature were pending in December, 1903, nearly ten months after the Elkins Act went into effect, to compel common carriers to comply with the provisions of section 6. This list is as follows:

Brewer et al. v. Louisville & Nashville Railroad Company et al. Griffin, Ga., long and short-haul case. United States Circuit Court, southern district of Georgia.

Interstate Commerce Commission v. Northern Pacific Railroad Company et al. Fargo, N. D., long and short-haul case. United States Circuit Court, district of North Dakota.

Interstate Commerce Commission v. Western New York & Pennsylvania Railroad Company et al. Discriminating rates on petroleum oil. United States Circuit Court, western district of Pennsylvania.

Interstate Commerce Commission v. Nashville, Chattanooga & St. Louis Railway Company et al. Hampton, long and short-haul case. United States Supreme Court.

Interstate Commerce Commission v. Southern Pacific Company et al. Kearney, long and short-haul case. United States Circuit Court, northern district of California. Argued and submitted March 16 and 17, 1903.

Interstate Commerce Commission v. Southern Railway Company. Danville, long and short-haul case. United States Supreme Court.

Interstate Commerce Commission v. Southern Pacific Company et al. California orange case. United States Circuit Court, southern division of the southern district of California.

Interstate Commerce Commission v. Lake Shore & Michigan Southern Railway Company et al. Hay case. United States Circuit Court, northern district of Ohio.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company. Contempt proceedings against Milton H. Smith, president Louisville & Nashville Railroad Company; W. Hale, superintendent (fourth division) Seaboard Air Line Railway, and W. B. Denham, superintendent (second division) Atlantic Coast Line Railroad Company, for violating injunction decree. United States Circuit Court, southern district of Georgia.

United States v. Chicago & Northwestern Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Illinois Central Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Michigan Central Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Pennsylvania Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Lake Shore & Michigan Southern Railway Company. *Proceeding to enjoin departure from published tariff*

rates. Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Wabash Railroad Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Atchinson, Topeka & Santa Fe Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Rock Island & Pacific Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Burlington & Quincy Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Milwaukee & St. Paul Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago & Alton Railroad Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago Great Western Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Missouri Pacific Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chesapeake & Ohio Railway Company. Proceeding to enjoin departure from published tariff rates. Temporary injunction granted. United States Circuit Court, western district of Virginia.

United States v. J. E. Geddes, receiver Ohio River & Western Railroad Company. Action to recover penalty under section 6, Safety-Appliance Act of March 2, 1893, as amended April 1, 1896. United States Circuit Court of Appeals, sixth circuit.

United States ex rel. Martin A. Knapp et al. v. Boston & Maine Railroad Company. Petition for mandamus to compel

filing of annual report. United States Circuit Court, district of Massachusetts.

United States ex rel. Martin A. Knapp et al. v. Lake Shore & Michigan Southern Railway Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, northern district of Ohio.

United States ex rel. Martin A. Knapp et al. v. New York Central & Hudson River Railroad Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, southern district of New York.

United States ex rel. Martin A. Knapp et al. v. Delaware & Hudson Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, southern district of New York.

W. O. Johnson v. Southern Pacific Company. Damages on account of personal injury, but involving also construction of the Safety-Appliance Law. Intervention by United States applied for and allowed. United States Supreme Court.

§ 7. Continuous Carriage from Point of Shipment to Point of Destination.— That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Object and Scope of Section 7.— The provisions of section 7 are supplemental to the provisions contained in section 3, and

should be read and construed in connection therewith. Section 3, last paragraph, forbids discrimination among carriers, and is mandatory in its requirements that all connecting competing lines shall be treated alike and furnished with equal facilities for interchange of traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property. The design of section 7 was to forbid devices on the part of the carrier, whereby, for the purpose of evading the provisions of the act, collusive arrangements may be resorted to to change time schedules, compel carriage in different cars, break bulk, or require a cessation, stoppage, or interruption to prevent the connecting carrier from performing his contract of "continuous carriage." The statute recognizes the fact that there may be circumstances when breaking bulk or temporary stoppage may be unavoidable. But such acts, if not done in good faith, but merely to evade the provisions of the act, are unlawful, and subject the offending carrier to the pains and penalties of the act. See authorities in this connection under section 3, page 69, *ante*. The provisions of section 7, however, are not discussed or referred to in such decisions.

§ 8. Liability of Carrier in Damages.— That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Object and Scope of Section 8.— The object of section 8 in conjunction with section 9 was to create a civil remedy in favor

of shippers or persons who suffer loss or damage arising by reason of any violation of its provisions by the carrier, and to distinctly declare and impose the liability of the carrier. The act is penal in its nature in so far as it imposes a criminal liability for a breach of its conditions. It is a remedial statute in so far as it creates remedies by authorizing civil actions at law and in equity in the Federal courts. The remedial nature of the statute is emphasized by the amendment to section 22, as amended March 2, 1889, which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies."

It has been held, in an able and well-reasoned opinion by Chief Justice ANDREWS in the Court of Appeals of the State of New York, that the Legislature, subject to the limitations of constitutional law, may not only invent remedies, but it may also create rights. *Bertholf v. O'Reilly*, 74 N. Y. 509.

Section 8 creates the liability of the carrier under the act.

Section 9 provides the remedies giving the Federal courts jurisdiction to enforce the liabilities imposed upon the carrier for a violation of the statute, both at law and in equity. In so far as the liability declared by this section relates to the duty which was imposed on the carrier at common law, the statute creates no new liability. The ninth section declares the mode in which such liability may be enforced in the Federal courts.

The liability under section 8 is confined exclusively to a breach of duty under the Interstate Commerce Act, in respect solely to interstate commerce. The liability of a common carrier engaged in domestic commerce remains as it always existed at the common law, except in so far as it has been regulated by the laws of the several States.

Treble Damages — Common Law Superseded.— At common law a shipper had a cause of action against the carrier to recover damages resulting from unreasonable and extortionate charges. But when the Legislature sees fit to legislate upon the subject the statutory remedy supersedes the common-law remedy, unless the statute declares that the remedy given by the statute is not exclusive but cumulative. (November, 1892, Cir. Ct. West. Dist. Mo.) *Windsor Coal Co. v. Chicago Railroad*, 52 Fed. Rep. 716.

Treble Damages — State Statute.— The State of Colorado in 1885, two years prior to the passage of the Interstate Commerce Act, passed a law (Laws 1885, chap. 309), prohibiting rebates and unjust discriminations by carriers against shippers, giving to a party injured the right to sue for a violation of the statute and authorizing a recovery in treble damages. A shipper of coal sued for a violation of the statute. Defendant set up as a defense a contract whereby it agreed to give the favored shipper and competitor of plaintiff a lower rate of freight only in case it furnished for transportation each year 200,000 tons of coal. The answer failed to allege that the favored shipper furnished this amount for transportation, but it was nevertheless given the rebate. Defendant also set up as an excuse for the giving of the rebate what it alleged was a claim it had against the favored shipper for damages. The damages were unliquidated and arose in tort. The court below ruled out both defenses and plaintiff had a verdict. Judgment affirmed. *Union Pacific v. Goodridge*, 149 U. S. 680.

The court held that the object of the Colorado statute was intended to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power not in the railroad company itself, but in the Railroad Commissioner to except "special cases designed to promote the development of the resources of this State." The court observed further that it is not the proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality. *Ib.*

The above case doubtless was brought in the Federal court and the latter acquired jurisdiction by reason of the diverse citizenship of the parties, the action being to recover damages under a State statute.

Suit at Law by Shipper — Pleading.— An action by a shipper against a carrier to recover a payment charged by the carrier in

excess of charges to other shippers of similar goods to the same destination from another place of shipment of the same or greater distance where the charge is not in itself unreasonable prior to the amendment of March 2, 1889, declaring all remedies under the act to be cumulative, was held to be an action in the nature of a penalty on account of the wrongful conduct of defendant. In that action, where it appeared that the charge was not in itself unreasonable, the court said that plaintiff was bound by the rule of strict proof, and his complaint must clearly show a violation of the statute and the damages sustained by the shipper in consequence. *Parsons v. Chicago Railway*, 167 U. S. 447.

A violation of the statute must be clearly alleged and such violation will not be inferred from uncertain or ambiguous allegations. *Ib.*

Discrimination — Suit in Equity — Pleading.— A bill of complaint in equity seeking an injunction to restrain the carrier from charging unjust, unlawful, or unreasonable rates must set forth facts to sustain the charge. It must show that the plaintiff has no other means of transportation except upon the lines of the defendant carrier, and it must set forth that defendant charges less to other shippers under substantially similar circumstances and conditions, and the extortion or discrimination complained of must be set forth. *De Bary Baya Merchants' Line v. Jacksonville Railroad*, 40 Fed. Rep. 392.

Limitation of Actions.— The Interstate Commerce Act, which creates a statutory liability against the carrier in favor of a shipper for the full amount of damages sustained by the shipper in consequence of any violation of the provisions of the act, is in the nature of a penal statute, and the damages sought are in the nature of a penalty. As the act is silent as to the time within which a shipper may bring suit to recover damages under the act, the Statute of Limitations of the State in which the Federal court is situate will govern. *Rattican v. Terminal Railroad*, 114 Fed. Rep. 666; *Murray v. Chicago Railroad*, 92 Fed. Rep. 868.

Limitation — Fraudulent Concealment.— If fraudulent concealment is relied upon to avoid the Statute of Limitations,

it must appear that the concealment was such as prevented the party from exercising due diligence in discovering the facts. Plaintiff, in a suit to recover rebates and drawbacks, alleged that defendant publicly posted its tariff rates, and informed plaintiff that no deviations were made from the posted rates, and that no rebates, drawbacks, or concessions from such rates were given to any shipper, and that the rate charged plaintiff was the same as rates given to other shippers, and plaintiff believed these statements and representations and relied on them, but that they were false, fraudulent, and untrue, and that the fact that secret rebates were given was fraudulently concealed from plaintiff, who only ascertained them eighteen months before bringing suit.

The court held that no facts were stated to excuse the delay of eighteen months after the facts were discovered, and no facts from which the court could infer that plaintiff thereafter exercised due diligence to protect his rights. *Murray v. Chicago Railroad*, 92 Fed. Rep. 868; *Ratican v. Terminal Railroad*, 114 Fed. Rep. 666.

Abatement — Revival of Action.—The authorities indicate that an action or proceeding instituted by a shipper, or in his behalf, against the carrier does not abate on the death of the plaintiff or petitioner. The general rule that actions in tort abate where the plaintiff dies, unless a different rule is prescribed by the statute, has no application to actions or proceedings under the Interstate Commerce Act. An action to recover for personal injuries dies with the person, unless the statute prescribes otherwise, because the injuries theoretically are to the person and not to his estate. Actions or proceedings under the Commerce Act are not, strictly speaking, actions in tort. They are brought to recover for injuries to the estate, not to the person. It has never been expressly decided thus far whether they are strictly actions upon contract, but they certainly arise by reason of the breach of an implied, if not an express, contract on the part of the carrier. The presumption of law is that any contract the carrier makes is legal. The law will imply a promise on the part of the carrier to carry for all for a like charge for a like service. A failure to do so would clearly be a breach of such implied promise. The

courts have said that an action against the carrier, under the act, to recover damages for excessive charges or unlawful discrimination is one sounding in tort. It has been held that the statute, with respect to actions of this character, is penal in its provisions, imposing a forfeiture or penalty. But, on the other hand, the acts of the carrier, when damage is shown, result in pecuniary loss to plaintiff and benefit to defendant. After plaintiff's death it is pertinent to show that the wrongdoer has derived benefit from the acts complained of, whereby plaintiff's estate became lessened and less beneficial to the latter's executors or administrators. By 4 Edw. III, chap. 7, *de bonis asportatis in vita testatoris*, by an equitable construction the executor or administrator shall have the same action for any injury done to the personal estate of the testator or intestate, whereby it became less beneficial to them as the deceased might have had, whatever the form of the action. Accordingly held that an action to enforce a forfeiture abates, unless the act complained of is devisable and the wrongdoer's estate has derived a benefit therefrom. *United States v. De Goer*, 38 Fed. Rep. 80; *United States v. Riley*, 104 Fed. Rep. 275.

An act of Congress imposed a legal liability upon the directors of a national bank for acts done which resulted in injury to the bank or its stockholders or creditors. The statute created a liability against the bank in damages for acts done by its officers in violation of the statute. The court held that the statute was to be construed as a remedial, not as a penal statute in this regard, and that an action under it survives against the estate of the defaulting officer. *Stephens v. Overstolz*, 43 Fed. Rep. 465.

Laws created for the prevention of fraud, or for the suppression of a public wrong, or to affect a public good, are not, with respect to the liability imposed, to be construed as penal statutes, although a penalty may be inflicted for their violation. *Taylor v. United States*, 3 How. 197; *Stockwell v. United States*, 13 Wall. 531.

The Supreme Court of the United States, in the case of *Louisville Railroad v. Behlmer*, 175 U. S. 648, decided that a cause of action prosecuted in behalf of a shipper who instituted proceedings through the Interstate Commerce Commis-

sion survived after the death of the petitioner. The court reversed the court below, but in so doing recited the fact that the petitioner had died and directed that his legal representatives be substituted as petitioners, and that the Commission should hear the evidence *de novo* and render its decision to conform to the rulings of the court as set forth in the opinion of Justice WHITE. *Louisville Railroad v. Behlmer*, 175 U. S. 648.

§ 9. Remedy of Shipper in Alternative by Complaint to Commission or Suit in Federal Court.— That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Object and Scope of Section 9.—Section 9 prescribes the remedy for the enforcement of the liability which section 8 imposes

upon the carrier. It provides a dual remedy. It opens both the Circuit Courts and District Courts of the United States, and declares that any person claiming damages against the carrier arising from any violation of the act may bring suit to recover the same in either of said courts. It also declares that the party aggrieved may complain to the Interstate Commerce Commission as prescribed in section 12. These remedies, however, are not concurrent, and the suitor must elect before which tribunal he will appear. The statute declares that he cannot pursue both remedies. If the party elects to go before the Commission, the award or order of that body, if in his favor, must be enforced by the Commission upon its application to the Federal court, if the carrier neglects or refuses to comply with the terms and conditions embraced in the order.

In an action for damages by a shipper against the carrier in the Federal court, the plaintiff is not obliged to resort to the cumbrous and expensive equitable remedy of a bill of discovery in order to inspect the books and papers of the carrier, which may be pertinent and essential, to establish the evidence to sustain his cause of action. The statute confers power upon the court to compel the corporation carrier, or its agents, officers, servants, or trustees, to produce the books and papers of the defendant. The carrier cannot excuse such production upon the ground that under the Fifth Amendment to the Constitution he cannot be compelled to give evidence which may tend to incriminate him for the reason that the statute now declares not only that the evidence sought "shall not be used against any such person on the trial of any criminal proceeding," but that the witness shall not be prosecuted for any offense disclosed by reason of giving such testimony.

Jurisdiction — Diversity of Citizenship not Essential.— In ordinary controversies, where no Federal question is involved in the subject-matter of the action, and the parties to the action are all citizens of the same State, the Federal court acquires no jurisdiction, and it can exercise none. But if the controversy is "between citizens of different States" the Constitution extends the jurisdiction of the Federal courts to such a controversy. Article 3, section 2, provides that the judicial power of the United States shall extend to controversies

“between citizens of different States.” The Judiciary Act, approved March 3, 1875, as amended August 13, 1888, gives to the Circuit Courts of the United States original cognizance “of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,” in which there shall be a controversy between citizens of different States.

Where, however, a Federal question is involved, or the right sought to be enforced arises under the Constitution or laws of the United States, the Federal courts acquire jurisdiction irrespective of the citizenship of the parties. The jurisdiction of the Circuit Courts of the United States is defined in section 1 of the Judiciary Act of March 3, 1875, as amended August 13, 1888, as follows:

Jurisdiction of Circuit Courts of the United States.—Sec. 1.—That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court;

And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only

in the district of the residence of either the plaintiff or the defendant;

Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made;

And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law. (25 Stat. at L. page 433, chap. 866, approved August 13, 1888.)

Jurisdiction of District Courts of the United States.— Section 9 of the Commerce Act confers jurisdiction in suits to enforce its provision upon any District Court of the United States of competent jurisdiction. The plaintiff, in bringing an action under the Commerce Act, is not bound to bring it in a Circuit Court of the United States, pursuant to the provisions of the act of March 3, 1875, *supra*, but may elect to sue in either a Circuit or District Court of the United States of competent jurisdiction.

Appellate Jurisdiction.— For the provisions of law and statutes applicable to the appellate jurisdiction of the Federal courts, see *post*, page 171.

Federal Jurisdiction under Interstate Commerce Act.— The jurisdiction of the Federal courts in proceedings under the Interstate Commerce Act is conferred by that act, and arises from a right in the plaintiff which is conferred by a law of the United States. The judicial power of the Federal court is extended by the act to matters relating to rights of shippers engaged in interstate commerce. As the right of plaintiff arises under a Federal statute, diversity of citizenship of the parties to the record is not essential to confer jurisdiction. The jurisdiction of the court is based solely on the right claimed under the Interstate Commerce Act, and is exclusive. Whatever rights plaintiff may have at common law or before the passage of the act is immaterial to the question of jurisdiction. *Tift v. Southern Railroad Co.*, 123 Fed. Rep. 789 (Dist. Ct. So. Dist. Ga. July, 1903).

SPEER, J., in the *Tift* case, examined fully the question of the jurisdiction of the Federal court, and cited in support of his conclusions the following authorities: *Toledo R. Co. v. Penna. R. Co.* (Cir. Ct.), 54 Fed. Rep. 730; *Osborn v. Bank*, 9 Wheat. 738; *Kentucky Bridge Co. v. L. & N. R. Co.* (Cir. Ct.), 37 Fed. Rep. 567; *Ex parte Lennon*, 64 Fed. Rep. 320; s. c., 12 C. C. A. 134; s. c., 166 U. S. 548; *Tennessee v. Davis*, 100 U. S. 257; *Oregon Short Line v. Northern Pacific* (Cir. Ct.), 51 Fed. Rep. 465; *Allen v. Oregon Co.*, 98 Fed. Rep. 16; *De Barry v. Jacksonville Railroad* (Cir. Ct.), 40 Fed. Rep. 392; *Louisville Railroad v. Behlmer*, 175 U. S. 648; *Central Stockyards Co. v. Louisville Railroad*, 118 Fed. Rep. 113; *Augusta Railroad v. Wrightsville Railroad* (Cir. Ct.), 74 Fed. Rep. 522; *Oregon Railroad v. Northern Pacific Railroad*, 61 Fed. Rep. 158; s. c., 9 C. C. A. 409; *Chicago Railroad v. Burlington Railroad* (Cir. Ct.), 34 Fed. Rep. 481.

Actions and proceedings under the Interstate Commerce Act are such as derive their authority solely from the statute. As the subject-matter of such suits arise under an Act of Congress, the Federal courts acquire jurisdiction by virtue of the statute without regard to question of diversity of citizenship. (September, 1891, Cir. Ct. West. Dist. Tenn.) *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771.

Jurisdiction Exclusive — Rebate Suits — Proper District.— The cause of action given to a shipper is for a violation of section 2, and the liability of the carrier for such breach is created by section 8. The remedy is provided by section 9. The jurisdiction of the Federal courts in such actions is exclusive, and in the trial thereof the Federal court does not exercise a jurisdiction which is concurrent in the State courts. The jurisdiction of the Federal courts under the Interstate Commerce Act is not affected by the provisions of the Judiciary Acts of March 3, 1887, and August 13, 1888, both passed subsequent to the passage of the Commerce Act. (*In re Hohorst*, 150 U. S. 653; *Railway Co. v. Gonzales*, 151 U. S. 496). Section 9 declares that such actions must be brought in "a circuit court of competent jurisdiction," which means a circuit court in any district in which the defendant can be found. *Van Patten v.*

Chicago Railroad, 74 Fed. Rep. 981 (June, 1896, Cir. Ct. No. Dist. Iowa, W. D.).

In the case cited the defendant was incorporated under the laws of Wisconsin, but operated its road in the northern district of Iowa. Defendant company was found and served in the latter district. *Held*, that jurisdiction attached, and that the Circuit Court had jurisdiction over the defendant corporation, and of the subject-matter of the action. *Ib.*

Jurisdiction — Federal Question.—The construction or interpretation of a State law, relating only to domestic commerce, or commerce wholly within the State, if involved in an action in which all the parties are residents of the same State does not necessarily involve a Federal question, and the Federal courts have no jurisdiction in such an action. If such an action be removed from the State court, the Federal court will remand it on the ground of want of jurisdiction. *Minnesota v. Northern Securities Co.* (April, 1904), 194 U. S. 48; *State of Iowa v. Chicago Railroad*, 33 Fed. Rep. 391 (December, 1887, Cir. Ct. No. Dist. Iowa).

See also "Jurisdiction on Removal," *infra*.

Equity Jurisdiction as to Rates.—A Circuit Court of the United States, in the exercise of its equity jurisdiction, at the suit of a party claiming to be aggrieved by rates of transportation in a State, imposed by a Railroad Commission of the State, may decree that the rates so established are unreasonable and unjust, and may, by injunction, restrain their enforcement; but the court has no power to establish rates, or to enjoin the State Commission from making and establishing new schedules of rates and tariffs. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

In such an action brought against the Commission and the individual members thereof, the court has jurisdiction as the action is not one against a State but against its administrative officers. *Ib.*

Jurisdiction — Forcible Obstruction to Interstate Commerce — Injunction.—The government of the United States may prevent a forcible obstruction of interstate commerce, and of the transportation of the mails, and for that purpose may,

through its Attorney-General or district attorneys, file a bill in equity in a proper Federal court and secure a writ of injunction to restrain acts of violence whereby interstate commerce and transportation of the mails is interfered with. It may enforce obedience to its orders by fine and imprisonment. In a proceeding to punish for contempt a violation of the court's order, the defendant is not entitled to a jury trial. *In re Debs*, 158 U. S. 564.

The equity jurisdiction of the Federal court is not ousted by the fact that the acts complained of also involve crimes and violations of criminal law. It is not the province of a court of equity to enjoin the commission of crimes. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by, or are themselves violations of, the criminal law. *Ib.*

Jurisdiction — Not Ousted Pending Appeal.— The jurisdiction of the United States Supreme Court cannot be ousted by the acts of defendants, sued as members of a freight association, by dissolving the association pending the appeal to the Supreme Court. It appeared that the relief sought was for an injunction to restrain the enforcement of a traffic agreement claimed to be in violation of the Sherman Anti-Trust Act, for a dissolution of the association formed to operate under it, and to have the agreement adjudicated as null and void. *Held*, that defendants, by their voluntary act in dissolving the association pending the appeal, could not oust the appellate tribunal of jurisdiction to pass upon the other questions involved in the appeal. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

An action against carriers to enforce obedience to an order of the Interstate Commerce Commission directing such carriers to furnish proper and reasonable facilities for interchange of traffic, presents a case arising under the Constitution and laws

of the United States of which the Federal courts have jurisdiction. *In re Lennon*, 166 U. S. 548.

Jurisdiction cannot be attacked in a collateral proceeding by one not a party to the original proceeding by evidence *dehors* the record, if the requisite citizenship giving the court jurisdiction appears upon the face of the bill in the original proceeding. *Ib.*

Jurisdiction on Removal from State Court.—An action in which the subject-matter does not involve a Federal question, and in which the parties are all residents of the one State, is cognizable only in the State court. If such a suit were brought originally in the Federal Court, the latter would have no jurisdiction of the action. If brought originally in a State court and removed to the Federal court, the latter would acquire no jurisdiction by virtue of such removal. If a Federal question should be raised in the action after removal, jurisdiction would not attach because the Federal court at the time of removal acquired no jurisdiction and could acquire none, by amendment or otherwise.

An action brought by a sovereign State of the Union as plaintiff in its own State court against non-resident defendants, where the action arises under the laws of the State, does not involve a Federal question. It is not an action "between citizens of different States," because a State is not a citizen within the meaning of that clause of the Constitution. In such an action the State court has exclusive jurisdiction. A Federal court has none, and can acquire none upon removal of the action from the State court. (April, 1904.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

In the case cited the State of Minnesota, as plaintiff, brought suit in a State court of the State of Minnesota against the Northern Securities Company, a New Jersey corporation, the Great Northern Railway Company, a Minnesota corporation, and the Northern Pacific Railway Company, a Wisconsin corporation. The suit was in equity for a decree annulling an agreement by the two defendant railway companies operating competing parallel lines of road from the Great Lakes to the Pacific ocean, wherebv they sought to transfer to the defendant, the Northern Securities Company (not a railway corporation

or carrier, but a holding corporation), all the stock, property, and franchises of the two carrying companies in effect, though not in form, merging and consolidating them in the securities company. Plaintiffs also prayed for an injunction to restrain the consolidation. It was claimed by plaintiff that the transaction sought to be annulled destroyed all competition and created a monopoly of all railway traffic in the State of Minnesota to the great, permanent, and irreparable damage of the State and the people thereof in violation of the laws of Minnesota, and also in violation of the Sherman Act of July 2, 1890. Plaintiff claimed also that the transaction was an agreement in restraint of interstate commerce and was, therefore, void under the Federal statute. Defendant removed the case to the Circuit Court of the United States on the ground that a Federal question was involved.

Held, that the case involved no Federal question or controversy arising under the Constitution and laws of the United States. The court observed that "if relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do was forbidden by the statutes of Minnesota, the Circuit Court of the United States could not have taken cognizance of the case; for confessedly, such a controversy would not have been one between citizens of different States, nor could such a suit have been deemed one arising under the Constitution and laws of the United States." (April, 1904.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

As to the contention that a Federal question was involved by reason of the allegation that the agreement complained of was in restraint of trade and commerce, and in violation of the Sherman Act, forbidding combinations in restraint of interstate commerce, the court held the contention wholly untenable. The allegations did not involve a controversy within the jurisdiction of the Federal court. Criminal proceedings for a violation of the Sherman Act could be instituted only in the name of the United States. The action which had been removed was not (1) a criminal proceeding under sections 1, 2, and 3 of the Sherman Act; nor (2) a suit in equity in the name of the United States under section 4; nor (3) a proceeding in the name of the

United States to declare a forfeiture under section 6; nor (4) an action by any person or corporation for the recovery of three-fold damages for injury done to business or property by some other person or corporation under section 7. Hence not within the Sherman Act. Decree reversed and Circuit Court instructed to remand the case to the State court. *Ib.*

Jurisdiction — Federal Question — Switching Facilities.—

Defendant contracted with the city of Dubuque to allow all railroads entering the city to have the use of its switching and terminal facilities. The Legislature of Iowa also passed a statute that different companies might have the use of such facilities, and the Iowa Railroad Commission fixed the rates to be charged for such use. The defendant, and defendant Illinois Central railroad, subsequently acquired control of all lines entering the city, and acquired tracks and means of access which had been constructed by previous owners in streets and lanes under ordinances of the city. Thereafter complaint was made to the Railroad Commission of Iowa that excessive charges were exacted by defendant for use of terminal and switching facilities. The Commission ruled that all sidings in Dubuque were public highways and might be used by all carriers, and fixed the rates for their use. The State of Iowa sued in the District Court of Dubuque, a State court, to enforce by injunction the order of the State Commission. Defendant removed the cause to the Federal court. Plaintiff moved to remand. The court granted the order and remanded the case on the ground that no Federal question was involved. *State of Iowa v. Chicago Railroad*, 33 Fed. Rep. 391 (December, 1887, Cir. Ct. No. Dist. Iowa).

Jurisdiction — Removal — None in State Court under Commerce Act.— A State court has no jurisdiction to enforce the rights of shippers for a violation of the provisions of the Interstate Commerce Act. The jurisdiction of the Federal courts for violations of that act are exclusive. On removal of such a suit, begun in a State court to the Federal court, the latter acquires no jurisdiction, as the action in the State court was one in which the State court had no jurisdiction. *Sheldon v. Wabash Railroad*, 105 Fed. Rep. 785.

An action at law, brought by a shipper against a carrier to

recover damages for payments made under protest upon shipments of merchandise from one State (Illinois) to another, or to a foreign country, which rates were alleged to be unjust and unreasonable and contrary to the provisions of the Interstate Commerce Act, must be brought in a Federal court. *Swift v. Pennsylvania Railroad*, 58 Fed. Rep. 858 (November, 1903, Cir. Ct. No. Dist. Ill.).

The action in the case cited was brought in the State court, and was removed by defendants into the United States Circuit Court for the northern district of Illinois on the ground of diversity of citizenship. Demurrers were interposed before removal on the ground that the State court had no jurisdiction of the action. That Congress alone had power to regulate Interstate Commerce, and that unjust and unreasonable rates are condemned by the Interstate Commerce Act, and plaintiffs should have sued in the first instance in the Federal court. Upon the removal of the cases the demurrers were argued there, and were sustained on the ground that the State court had no jurisdiction of the action and none was acquired by the Federal court upon removal. The court invoked the familiar rule that in removed cases the jurisdiction of the Federal court is no broader than that of the court in which the action was begun, and the removal does not enlarge the right of the court to hear the cause. *Ib.*

Jurisdiction Maintained on Removal.—An action was brought in the State court by the carrier against the shipper to recover freight, under a State statute, on coal shipped from Clearfield, Pa., to Perth Amboy, N. J. It was removed to the Federal court, where defendant interposed a defense under the Interstate Commerce Act, and claimed that a Federal question was involved. Defendants claimed that the Federal court had no jurisdiction because the State court had none. *Held*, that the suit was not brought under the Interstate Commerce Act, but was brought to recover freight, and that the State court had jurisdiction, and upon removal the Federal could maintain jurisdiction. *Lehigh Valley Railroad v. Rainey*, 99 Fed. Rep. 596; s. c., on motion denying new trial after verdict for plaintiff, 112 Fed. Rep. 487 (January, 1902, Cir. Ct. East. Dist. Pa.).

Jurisdiction not Conferred by Consent.— Consent of the parties cannot confer jurisdiction. The question as to whether the Federal court has jurisdiction of an action must be tested by an examination of the bill or complaint filed on behalf of plaintiff or complainant. If the record contains an allegation which might seemingly involve a Federal question, and it becomes apparent at any stage that the case does not really and substantially involve a dispute or controversy of which the Federal court can take cognizance for the purpose of a final decree on the merits, it is the duty of the court to proceed no further, notwithstanding the stipulation and consent of the parties to remain in the Federal court. The court should remand the case as directed by the Judiciary Act of 1887-1888 (24 Stat. 552, chap. 373; 25 Stat. 433, chap. 866). This act provides, among other things, that the Circuit Court of the United States may take original cognizance of all suits of a civil nature at law or in equity arising under the Constitution and laws of the United States, where the matter in dispute, exclusive of costs, exceeds in value the sum of \$2,000. The second section provides for the removal from a State court of "any suit of a civil nature, at law or in equity, arising under the Constitution and laws of the United States, * * * of which the Circuit Court of the United States is given original jurisdiction by the preceding section." Under section 2 removals from a State court can be made only by defendant in suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, thus limiting the jurisdiction of the Circuit Court of the United States, on removal by the defendant under this section, to such suits as might have been brought in that court by the plaintiff under the first section. (24 Stat. 553; 25 Stat. 434.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

The above case was brought in a State court of Minnesota, and was removed by defendants to the Circuit Court of the United States. The case was tried in Federal court, and a decree was rendered therein against the plaintiff and in favor of defendant. When the case reached the Supreme Court of the United States, the court, before giving any decision on the merits, directed counsel to submit briefs on the question of jurisdiction, notwith-

standing all parties were willing and consented that the action might remain in the court. Upon the question of jurisdiction it was held that a Circuit Court of the United States cannot take cognizance of an action which involves no Federal question unless it appears from the record that the controversy is between citizens of different States. And it must appear that all the parties plaintiff are citizens of the same State, and that none of the defendants are citizens of the State of which plaintiff is a citizen. A State is not a citizen within the meaning of this clause of the Constitution. *Held* further, that the suit presented no Federal question or controversy arising under the Constitution and laws of the United States. *Ib.*

Suit under Commerce Act not Removable.— Upon the authorities it seems clear that if an action to enforce any of the provisions of the Interstate Commerce Act is brought in a State court, the suit cannot be removed into a Federal court for the reason that the State court could acquire no jurisdiction of the action, and upon removal the Federal court could acquire none. In such an action the jurisdiction of the Federal court is original and exclusive, and plaintiff must bring his suit in the Federal court in the first instance.

Suits Removable.— Actions brought under a State statute may be brought in a State court, or if the parties in such an action are citizens of different States, and the amount involved exceeds \$2,000, exclusive of interest and costs, the action may, on defendant's motion, be removed to a Circuit Court of the United States, not on the ground that a Federal question is involved, but solely on the ground that it is a controversy between citizens of different States upon a cause of action arising under a State statute.

Suits brought in a State court to enforce treble or single damages given by State laws for merchandise shipped within the State in violation of such laws could be removed by defendant from the State court to a Circuit Court of the United States, if the amount involved, exclusive of interest and costs, exceeded \$2,000, and the parties were citizens of different States, namely, all plaintiffs were citizens of one State, and all defendants were citizens of another State or States.

The manner in which suits can be removed from a State court are set forth in the act of March 3, 1875. See *infra*.

Mode of Removal from State.—The provisions of the act of March 3, 1875 (chap. 137), which relates to the mode in which causes shall be removed from a State to a Federal court as amended by act of August 13, 1888 (chap. 866), is as follows:*

Sec. 2. Suits Involving Federal Law.—That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

Suits between Citizens of Different States.—And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

Removal—Local Prejudice.—And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:

* For section 1 of the statute, see *ante*, page 32.

When Suit may be Severed.— *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

Local Prejudice when Suit Remanded.— At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

Remanding Order not Appealable.— Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

That section 3 of said act be, and the same is hereby, amended so as to read as follows:

Sec. 3. Petition and Bond.— That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if

said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit;

And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court;

Suit Affecting Title to Land.— And if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of \$2,000, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial;

And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district;

And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Sec. 2. Receiver Governed by State Laws.— That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not ex-

ceeding \$3,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed;

But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

Sec. 4. Citizenship of National Banks.— That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located;

And in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

Sec. 5. Laws not Repealed.— That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

Sec. 6. Repealer.— That the last paragraph of section 5 of the act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed:

Provided, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

Sec. 7. Appointment of Relatives Forbidden.— That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member. (August 13, 1888.)

Remedy — Nature of Injunction.— The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which the suit may be brought. One entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. An enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States.

[Citing *Broderick's Will*, 21 Wall. 503; *Holland v. Challen*, 110 U. S. 15; *Dick v. Foraker*, 155 U. S. 404; *Bardon v. Land Co.*, 157 U. S. 327; *Rich v. Braxton*, 158 U. S. 375.] But if the cause in its essence be one cognizable in equity, the plaintiff — the required value being in dispute — may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of Federal jurisdiction. *Smyth v. Ames*, 169 U. S. 466.

So held in a suit for an injunction in the United States Circuit Court brought to restrain State officers from enforcing a schedule of rates of transportation within the State, promulgated pursuant to a State statute which provided also a penalty for its violation and mode of enforcement. *Ib.*

Injunction Pending Investigation — Restitution.— Pending an investigation by the Interstate Commerce Commission upon complaint of shippers to redress grievances against carriers by reason of unjust and unreasonable discrimination and unjust and unreasonable rates, whereby the business of the shipper may be impaired or ruined by reason of the acts complained

of, whereby the carrier prevents complainants from competing with other more favored shippers transporting merchandise to the same locality in the same territory, the court may enjoin the enforcement of the rates complained of pending such investigation. On the presentation of the Commissioners' report pending the action, the court will take such other or further action as may be conformable to law and the principles of equity. The court may also, in case a preliminary injunction is issued, compel restitution of sums illegally exacted in the interim. (So. Dist. Ga., July, 1903). *Tift v. Southern R. Co.*, 123 Fed. Rep. 789.

Contempt.— The court has power to punish an employee of a carrier for contempt where the latter refuses to obey an injunction against his employer if the employee has knowledge of the injunction and intentionally violates it by refusing to haul cars of the complainant "boycotted" by a union of which the employee is a member. This power exists although the employee was not a party to the suit, and was not served with the injunction order. *In re Lennon*, 166 U. S. 548.

Parties.— When the Interstate Commerce Commission makes an order involving through rates participated in by more than one road, under a common control, management, or arrangement, and sues in the Circuit Court to enforce its order, an omission to name one of the roads owning a portion of the line over which the through freight is carried is not fatal to the jurisdiction. The company omitted from the bill would have been a proper party, but it is not essentially a necessary party. *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

Evidence — Commission an Expert Tribunal as to Rates.— On the question as to weight to be given to the evidence of traffic managers with respect to reasonableness of rates, Judge TAFT observed: "It has been suggested that traffic managers are much better able by reason of their knowledge and experience to fix rates and to decide what discriminations are justified by the circumstances than courts. This cannot be conceded so far as it relates to the Interstate Commerce Commission which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is in a sense an expert tribunal; but it is true of the Federal court.

Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts whether railway managers or commerce commissioners is too clear to admit of dispute." *East Tennessee Railway v. Interstate Com. Co.*, 99 Fed. Rep. 52; reversed on another point, 181 U. S. 1.

"Switching" Charges may be Regulated by the State.— The service rendered by a carrier at a terminal known as "switching" is a local service. It forms no part of the charge for interstate transportation, is a terminal charge and not governed by the provisions of the Interstate Commerce Act, and the charges therefor may be regulated by the State (Minnesota) Railroad Commission. *Chicago Railroad v. Becker*, 32 Fed. Rep. 849 (December, 1887, Cir. Ct. Dist. Minn.).

The Chicago, Milwaukee and St. Paul railroad, a Wisconsin corporation, brought a suit in equity to restrain the Minnesota Commission from enforcing its schedule of rates for "switching" services. Plaintiffs moved for a preliminary injunction. Defendants opposed the application on the ground that the rates fixed by defendants was for services for terminal facilities, which formed no part of the carrier's charge for transportation, and did not affect interstate commerce. The court denied the motion for an injunction, and held that the question as to whether the rates of the State Commission were unreasonable was the only issue, and that must be disposed of on the trial. *Ib.*

Appellate Jurisdiction of Federal Courts.— Under the act of February 11, 1903, to expedite cases brought under the Interstate Commerce Act, and under the Sherman Anti-Trust Act, in which the United States is party complainant, appeals to the United States Circuit Court of Appeals are abolished and the appeal may be taken directly from the Circuit Court to the Supreme Court of the United States.

In other cases not within the act of February 11, 1903, an appeal lies in the first instance from the Circuit or District Court of the United States to the United States Circuit Court of Appeals. The jurisdiction of this tribunal is defined in the Judiciary Act of March 3, 1891 (chap.

517), entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." The provisions of this act with regard to appeals are as follows:

Sec. 4. Appeals from District Courts.— That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts.

But all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

Sec. 5. Appeals Direct to U. S. Supreme Court.— That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.*

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

Sec. 6. Appeals to U. S. Circuit Court of Appeals.— That the circuit courts of appeals established by this act shall exercise appel-

*Appeals may also be taken directly to the Supreme Court in certain cases under the act of February 11, 1903, which is made applicable to the Sherman Act and Commerce Act, *post*, under the Elkins Act. See *ante*, page 137

late jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1,000 besides costs.

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

Sec. 7. Appeals from Interlocutory Judgments — Injunctions.—That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals:

PROVIDED, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

§ 10. **Criminal Liability of Carrier.**— That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.* [*Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine herein-

* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903. Failure to file or publish tariff rates is punishable by a fine of not less than \$1,000 nor more than \$20,000 for each offense. See Elkins Act, *ante*, page 134.

before provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.]

Criminal Liability of Carrier for False Bills, Weights or Classification.— Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars,* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.]

Criminal Liability of Shipper for False Bills, Weights or Classification.— Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who

* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.]

Joint and Several Criminal Liability of Shipper and Carrier.— If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which

* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

such offense was committed, be subject to a fine of not exceeding five thousand dollars,* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court,] for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (*As amended March 2, 1889.*)

Object and Scope of Section 10.—Section 10 declares the pains and penalties incurred by any person or corporation offending against the provisions of the act, and may be designated as the penal section. It has been modified by the Elkins Act of February 19, 1903, in so far as to abolish imprisonment as a penalty; to declare in what district persons guilty of violations of the Commerce Act may be indicted, and extends also equitable remedies to secure the enforcement of the act. The Elkins Act declares that "imprisonment wherever now prescribed as a penalty being hereby abolished." See Elkins Act, *ante*, page 134.

Imprisonment, however, may still be imposed under section 6 in proceedings to punish the carrier, its officers, agents, or servants for violation of a mandamus issued under that section. Section 6 declares that a failure to comply with the requirements of such writ shall be punishable as and for a contempt. See section 6, *ante*, page 132.

Receiver Indictable.—A receiver of a railroad corporation is bound to comply with the provisions of the Interstate Commerce Act in like manner as the insolvent corporation which the receiver represents as trustee. He may be indicted for a violation of its provisions, but he cannot be held to be guilty of a crime

* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

for failing to comply with a joint traffic agreement to which he was not a party, and the terms of which he never sanctioned or recognized in any way. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

False Billing — Where Indictable.— The offense of “false billing” created by section 10, paragraph 3, is complete when the property is delivered for transportation, and such transportation to the place of destination is not essential to constitute the crime. The gist of the offense is the fraudulent act by which the lower rate is secured for the transportation of the property. Prior to the passage of the Elkins Act of February 19, 1903, it was held under section 10 that the crime of false billing could be prosecuted only in that district, being the district where the offense was committed, and not elsewhere. *Davis v. United States*, 104 Fed. Rep. 136 (October, 1900, C. C. A., 6th Circuit).

In the *Davis* case, which arose prior to the passage of the Elkins Act, defendant was indicted in the Federal court in Texas, charged with a violation of section 10, paragraph 3, of the act for having knowingly and willfully, by “false billing,” etc., obtained transportation of property at less than lawful rates. The indictment charged that the acts were committed by defendant in Cincinnati in the southern district of Ohio where the false representations were made and the goods delivered. The court discharged the prisoner on the ground that the crime charged in the indictment was not committed in Texas, the point of destination to which the goods were shipped, but was committed in the southern district of Ohio, and that was the only district in which defendant could lawfully be indicted and tried. *Ib.*

The court held further that section 731 of the Revised Statutes had no application. That section provides: “When any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, or punished in either district in the same manner as if it had been actually and wholly committed therein.” That the offense under section 10 was not one which required the transportation of the property to Dallas, Tex., to complete it, and that under section 731, United States Revised Statutes, it

might be prosecuted either where the shipment was made or where it terminated; but under the Commerce Act it was complete where the shipment was made and the false billing was done. *Ib.*

The defect in section 10 was regarded as serious under which it was held that one guilty of a violation of its provisions for "false billing" could be indicted only in the district where the billing was done, and the property delivered for transportation, and that defendant, after committing the crime, could not be indicted in a district embracing the point of destination. Under the ruling in the *Davis* case it was deemed to be comparatively easy to evade the statute. The language of the section was broadened, in effect, by the provisions of the Elkins Act of February 19, 1903, in this regard so as to make the act indictable in the district where the offense was committed, or through which the transportation may have been conducted, and commensurate with the provisions of section 731 of the Revised Statutes. The Elkins Act expressly declares that violations of the Commerce Act "shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one district and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. See Elkins Act, §§ 1, 3, *ante*, pages 134, 136.

Discrimination—Remedy by Injunction in Suit by the United States.—The remedy for the discrimination against shippers forbidden by section 2 is three-fold. Each shipper may maintain a civil action for damages against the carrier for its violation. A criminal prosecution may be maintained against the carrier for such violation under section 10. The Elkins Act, approved February 19, 1903, has now created a remedy in equity in which a writ of injunction may issue in addition to these remedies. If it appears that the carrier "is committing any discrimination forbidden by law" it shall be the duty of the Interstate Commerce Commission to inquire and petition a Circuit Court of the United States to secure a discontinuance of such

discrimination by proper orders, writs, or process, and such proceeding may be instituted after a preliminary inquiry directly on behalf of the United States as plaintiff. A Circuit Court of the United States, in the exercise of its chancery powers in such an action, has plenary power to issue an injunction to correct the evil complained of. The jurisdiction of the court was assailed by defendant on demurrer to the bill filed against it. The court overruled the demurrer and granted an injunction. *United States v. Michigan Central*, 122 Fed. Rep. (April, 1903, Cir. Ct. No. Dist. Ill., N. D.).

The case cited above arose on a demurrer to the complaint and motion for a preliminary injunction. The bill charged defendants with discrimination in the transportation of grain and packing-house goods. It was alleged that in transporting grain the carriers had entered the wheat belt and, by discriminating against competitors, defendants had eliminated all competition, leaving but a single favored dealer who purchased all the grain at all the stations along defendant's lines. The court, GROSSCUP, J., after stating the allegations of the complaint, said: "Of course, under such conditions the grain grower was deprived of the benefit of competition among dealers. The practical effect was the same as if the railroads had established agencies of their own to purchase the grain, and by giving to these discriminatory advantages had excluded all other grain purchasers from the field. Such a policy necessarily destroys the competition to which the grain growers in a given district are entitled.

"The Interstate Commerce Act confers upon each citizen engaged in productive industry, whether manufacturing, commercial, or agricultural, within the district traversed by these roads, the substantive right of having his product transported by the common carriers of the country at rates obtained by his competitor. This right of equal treatment at the hands of the common carriers is as much a right of property and affects as directly his interest in property as any other right of property that he may have under the law, statutory or common.

"Actions at law for the injuries described are plainly inadequate. The act of the railroad that affects the grain grower is not a single unlawful act; he is making shipments to-day, to-morrow, and next month. The policy of the roads, as shown

in the bill, affects him in each of these shipments and will affect him in all future shipments. His situation is analogous to that of one who is subjected to continuous trespass and who cannot on that account, in an action on a single trespass, obtain ample redress. Nothing short of the prohibitive arm of a Court of Chancery can give to the grain growers and other producers affected by this policy of the railroads, the free competitive field for the sale of their products to which they are entitled as a substantive right under the terms of the Interstate Commerce Act."

A suit in equity will lie, under the Elkins Act of February 19, 1903, at the instance of the government of the United States, to prohibit the execution of this policy of discrimination on the part of the carrier. The persons affected constitute the entire population of the districts through which defendants' roads are operated, by reason of which the remedy asked is in the nature of government for the entire population rather than of individual redress for the injuries done to persons in scattered localities. The remedy is analogous to that sought in equitable actions by which many people obtaining rights from common sources may be protected at the suit of such common source. A preliminary injunction, commensurate with the needs of the case, is granted upon the authority conferred by the Elkins Act. *Ib.*

The ruling of Judge Grosscup, in which he held that the Elkins Act was a remedial, as well as a penal statute, and was retrospective in its operation, is now authoritatively settled by the ruling of the Supreme Court of the United States in the *Missouri Pacific* case, *ante*, where the validity of the statute was affirmed and the propriety of the equitable remedy prescribed by it upheld. *Missouri Pacific Railroad v. United States*, 189 U. S. 274.

§ 11. Interstate Commerce Commission Created.—That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the

term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Object and Scope of Section 11.— A statute, no matter how useful or beneficial its provisions may be, is of little avail unless some adequate provision be made for its execution. The Interstate Commerce Act must be enforced by some body or corporation whose exclusive duty it shall be to secure its enforcement. Actions at law and suits in equity may be maintained by individual shippers who may invoke the aid of the courts to redress violations of its provisions. Such actions on the part of shippers, however, are not efficient to secure the continued and uniform observance on the part of the carrier of the requirements of the act. In order to secure the fruits of the legislation regulating interstate commerce, Congress deemed it wise and prudent to create a commission, a body corporate, to compel the continuous

observance of the provisions of the act, and to confer upon such body ample power and authority in that regard.

This commission is one of the most useful instrumentalities, as an adjunct of government, to secure to the commercial world the beneficial enjoyment of the acts of Congress upon the subject of interstate commerce. The powers conferred upon the commission created under section 11 are partly ministerial and partly executive. It possesses no judicial functions, but is given power to enforce its orders, mandates, and decrees through the Federal courts.

The history of the commission during seventeen years of its existence has demonstrated its usefulness. It is composed of a conservative and dignified body of men, who have earned the confidence of the public. It has performed its arduous, difficult, and manifold duties faithfully and well. In view of its work Congress has not only extended its powers and jurisdiction under section 12 of the Interstate Commerce Act, but has given to it power to enforce its subpoenas requiring the production before it of books and papers, by making it a penal offense to disobey the subpoena (Act of February 11, 1903, *post*, page 188), and has amplified its powers under the Elkins Act of February 19, 1903. (See *ante*, page 133.) It has been charged also with the duty of aiding United States District Attorneys in the enforcement of the Safety Appliance Law. (Act of March 2, 1893, *post*, page 340.) Also to secure the enforcement of the acts regulating telegraph lines upon government, military, and post-roads. (Act of August 7, 1888, *post*, page 330.)

Its duties are becoming more important as the population of the country expands and its commercial wealth and importance increases. It is a body whose services are essential and absolutely necessary to protect the shipper, carrier, and consumer alike.

Power to Fix Rates — Pending Legislation as to.— Merchants and shippers throughout the country have claimed that one of the principal defects in the Commerce Act consisted in the fact that it conferred no power on the Interstate Commerce Commission to fix rates subject to review by the Circuit Court of the United States. Commercial bodies, and Boards of Trade in the principal cities in the United States, have from

time to time sought to secure legislation to secure this defect, and have urged upon Congress the necessity of reasonable legislation to clothe the Commission with power to fix rates where it has been shown, upon pleadings and evidence before the Commission, that a given rate complained of was unreasonable and unjust. A number of bills are now before Congress having this end in view. See *post*, under head of "Pending Legislation," page 192.

Power of Congress to Create the Commission — Eleventh Section Constitutional.— Congress, under the grant of power to regulate commerce among the several States and with foreign nations, may create an administrative body with authority to investigate the subject of interstate commerce with power to call witnesses before it and require the production of books, documents, and papers relating to the subject. A proceeding by such a body, whereby the aid of a Circuit Court of the United States is invoked to compel witnesses to appear and testify, and to make an order requiring them to do so, is not merely advisory in its nature, but constitutes a judicial proceeding, notwithstanding the fact that the effect of the proceeding is to aid a body whose duties are administrative and executive only in the performance of duties imposed upon it by Congress. *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

For further discussion of the powers and duties of the Interstate Commerce Commission and the authorities relating thereto, see *infra*, § 12.

The Commission is a Corporation.— The Interstate Commerce Commission is a body corporate capable of suing and being sued by and in its corporate name and not in the individual names of the persons composing it. *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

§ 12. Commission may Prosecute through United States District Attorney.— That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed

as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Witnesses — Attendance Compulsory.— Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Penalty for Disobedience of Witness.—And any circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Testimony Taken by Deposition.—The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties,

nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Deposition, how Taken.— Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Foreign Witnesses — Fees.— If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States. (*As amended March 2, 1889, and February 10, 1891.*)

§ 12 Supplemented — Relating to Testimony — Act Approved February 11, 1893.— The authority embraced in section twelve of the Interstate Commerce Act, conferring power upon the Commission, with respect to investigations and inquiries, and the attendance of witnesses and the production of books and papers before it, was enlarged and extended by an act of Congress, approved February 11, 1893, chap. 83, entitled “An Act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and amendments thereto.” The provisions of this supplemental Act are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person [Immunity of Witnesses] shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled “An act to regulate commerce,” approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or

proceeding: *Provided, That [Perjury Punished]* no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Penalty for Refusal to Testify.— Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars,* [or by imprisonment for not more than one year or by both such fine and imprisonment.]

Object and Scope of Section 12.— Section 12 defines the powers and duties of the Interstate Commerce Commission, created by the previous section. These duties are primarily to investigate and inquire into the mode in which the vast commerce of the country is conducted with a view to secure the observance of the acts of Congress defining how such commerce shall be regulated. It defines the manner in which the Commission shall secure information and ascertain facts bearing upon the vast field over which it is given supervision. The duties thus conferred are arduous, delicate, and difficult, for the Commission must be just to the carrier as well as to the shipper, and to the general public also, which is the consumer, and which must eventually pay the tariff exacted on all goods transported. The purchase price of every article must, in addition to its cost, embrace also the cost of transportation. The public is in one sense the chief party in interest for it is the consumer, and the consumer in every instance must pay the freight.

* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

The difficulties with which the Commission must contend are obvious. The information sought must come from the carrier because investigations are usually instituted upon complaints of shippers claiming to be injured by the carrier by reason of discrimination, rebates, and manifold devices whereby goods are carried for competitors for less than schedule rates, whereby the rival is able to undersell and ruin a shipper who pays more freight than his competitor. Rebates and other forms of discrimination must of necessity be practiced secretly. The conduct of those engaged in the practice is made a crime. The carrier and favored shipper appear before the Commission usually as accused persons. The Commission is the tribunal before which they are tried in the first instance. The evidence to convict must come largely from the defendants and must be established upon an examination of their officers, agents, servants, and employees, and inspection of the books, papers, contracts, and documents. Under the Elkins Act the difficulty as to proof is not so great as formerly as that act makes the offer to give a rebate a crime.

The information sought by the Commission is rarely given without a stubborn and protracted legal contest. Congress has, therefore, armed its Commission with plenary power and authority to compel witnesses to testify and books, papers, and documents to be produced, and has authorized the Federal courts to enforce its orders. The arm of the Commission is practically the arm of the court, though the Commission cannot exercise directly judicial functions. Prior to the supplemental legislation under the act of February 11, 1893 (Laws 1893, chap. 83), *supra*, it was almost impossible for the Commission to perform successfully the duties imposed upon it for the reason that section 12 was not broad enough to secure immunity to witnesses summoned before it. The section, as it stood prior to the act of February 11, 1893, declared that testimony given by a witness which might tend to criminate him should "not be used against such person on the trial of any criminal proceeding." This language was held not sufficient to secure immunity to the witness who was protected by the Fifth Amendment which declares that no person shall be compelled "in any criminal case to be a witness against himself."

The difficulty was overcome by the act of 1893 which took away entirely the right to prosecute the witness on account of the testimony required to be given. Section 3 of the Elkins Act of February 19, 1903, contains the same provision and makes it applicable to all prosecutions under the direction of the Attorney-General of the United States in the name of the Interstate Commerce Commission under the Sherman Act or under the Interstate Commerce Act. See Elkins Act, § 3, *ante*, page 137.

Powers of Commission — Cannot Fix Rates.—The powers conferred upon the Interstate Commerce Commission by the Interstate Commerce Act is not a legislative power which enables it to fix absolutely maximum or minimum rates. The act gives the Commission power to pass upon the reasonableness of existing rates, but this power does not necessarily imply power to prescribe rates, but only to pass upon the question as to whether they are reasonable, and their functions require them to examine the facts relating to the question and give all evidence its proper weight. The Commission cannot act arbitrarily in fixing rates. Prescribing rates without acting upon the evidence would be to prejudice the case. *Interstate Com. Co. v. Cincinnati Railway Co.*, 167 U. S. 479 (May, 1897); *New Orleans & Texas Railroad v. Interstate Com. Co.*, 162 U. S. 184, followed.

The court was asked to answer a question as to the powers of the Commission certified to it by the United States Circuit Court of Appeals (6th Circuit) with regard to rates prescribed by it which should control in the future. In the course of its opinion the court cited the statute of a number of States as to powers conferred on Boards of State Commissioners, to-wit, Alabama, California, Florida, Georgia, Illinois, Iowa, Minnesota, Mississippi, New Hampshire, North Dakota, South Carolina, Kansas, Kentucky, Massachusetts, New York, and Vermont and observed: "Nowhere in the Interstate Commerce Act do we find words similar to those in the statutes referred to giving to the Commission power to 'increase or reduce any of the rates;' 'to establish rates of charges;' 'to make and fix reasonable and just rates of freight and passenger tariffs;' 'to make a schedule of reasonable maximum rates of charges;' 'to fix tables of maximum charges;' to compel the carrier to adopt such rate, charge, or

classification as said Commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given.

The first section of the act provides that "all charges * * * shall be reasonable and just and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." The power given is the power to execute and enforce, not to legislate. It is a power partly judicial, partly executive and administrative, but not legislative. The power to prescribe a tariff of rates is a legislative and not an administrative or judicial function, and is one of supreme delicacy and importance, and must be expressly delegated, and cannot be implied. The act does not confer upon the Commission power to prescribe future rates of tariff and it cannot, therefore, invoke a judgment by *mandamus* to enforce such future tariff. It has power to inquire as to manner in which the carrier conducts its business and compel complete and full information, and is charged with the duty to see that the carrier does not violate the law as to long and short hauls, discrimination, rebates, or preferences, and enforce the equality toward all shippers, enforce publicity of rates, and hold carriers to strict compliance to the provisions of the Interstate Commerce Act. *Ib.*

See also *Farmers' Loan and Trust Co. v. Northern Pacific*, 83 Fed. Rep. 249 (October, 1897, C. C. D., Wash., N. D.); *Interstate Com. Co. v. Northern Railroad*, 83 Fed. Rep. 611 (November, 1897, C. C. A., 4th Circuit).

Power to Fix Rates — Pending Legislation.—Commercial bodies and Boards of Trade throughout the country have claimed ever since the passage of the Commerce Act that its principal defect consisted in the fact that it contains no provision authorizing the Interstate Commerce Commission power to fix rates which shall be *prima facie* lawful, and which shall remain operative until set aside or modified by a Federal court of competent jurisdiction. Experience has shown that the failure of Congress to confer this power on the Commission has greatly impaired its usefulness. Congress has power to confer such authority. It is a power which the States usually confer on their Boards of State Commissioners. In the *Cincinnati Railroad* case, *supra* (167 U. S. 479), the court reviews the laws of six-

teen States, in which power to increase, reduce, or fix reasonable and just rates of freight and passenger tariffs was conferred on their respective Railroad Commissioners. It is a legislative and not an administrative or judicial power and must be expressly delegated. Such a power cannot arise by implication. Merchants and shippers throughout the United States have been persistent in their appeals to induce Congress to incorporate such power in the Interstate Commerce Act, and the demand for such legislation becomes more urgent every year. During the present session of the Fifty-eighth Congress five bills have been introduced in the House, and one in the Senate having this end in view. The five bills introduced in the House are now pending before the Committee on Interstate and Foreign Commerce. The Senate bill is pending before the Senate Committee on Interstate Commerce. These bills in the order of their introduction are as follows:

"A bill to define the duties and powers of the Interstate Commerce Commission," introduced in the House by Mr. Cooper of Wisconsin, December 8, 1903. "A bill to empower the Interstate Commerce Commission to fix transportation rates in certain contingencies," introduced in the House by Mr. Williams of Mississippi, December 10, 1903. "A bill to further define the duties and powers of the Interstate Commerce Commission," introduced in the Senate by Mr. Quarles of Wisconsin, December 12, 1903. "A bill to further regulate commerce and protect trade and commerce against unlawful restraints and monopolies," introduced in the House by Mr. Adamson, January 19, 1904. "A bill to increase the powers of the Interstate Commerce Commission, and to expedite the final decisions of cases arising under the act to regulate commerce by creating an interstate commerce court," introduced in the House by Mr. Hearst of New York, March 11, 1904. "A bill to increase the powers of the Interstate Commerce Commission," introduced in the House by Mr. Breazeale, April 6, 1904. The object and purpose of these various measures is to confer power on the Interstate Commerce Commission to prescribe rates, subject to review by the courts. They are more or less elaborate in detail. The bill introduced by Mr. Hearst seeks to take the burden of

cases under the act from the crowded calendars of the Federal courts, by creating a new Federal court, having exclusive jurisdiction of all cases arising under the act, to be known as "The Court of Interstate Commerce." The proposed act provides that the decisions of this court shall be final unless a constitutional question is involved. Such question may be certified to the Supreme Court of the United States, or unless the latter court directs the record of the Court of Interstate Commerce to be brought before it by writ of certiorari.

The bill introduced in the House by John Sharp Williams of Mississippi, provides as follows:

SEC. 1. That when, hereafter, the Interstate Commerce Commission shall declare a given rate for transportation of freight or passengers unreasonable, it shall be the duty of the Commission, and it is hereby authorized to perform that duty, to declare at the same time what would be a reasonable rate in lieu of the rate declared unreasonable.

SEC. 2. That whenever, in consequence of the decision of the Interstate Commerce Commission, a rate has been established and declared as reasonable and litigation shall ensue because of such decision, the rate fixed by the Interstate Commerce Commission shall continue as the rate to be charged by the transportation company during the pendency of the litigation and until the decision of the Interstate Commerce Commission shall be held to be error on a final judgment of the questions involved by the United States court having proper jurisdiction.

Mr. Williams clearly set forth the necessity of such legislation as is provided for in his proposed act in a speech delivered July 8, 1904, before the Democratic National Convention at St. Louis. In assigning the reasons for his proposed legislation Mr. Williams said:

"It [the Interstate Commerce Commission] can declare a given rate of 50 cents, let us say, to be unreasonable, but as it cannot prescribe what would be reasonable in its stead, the railroad can do one or two things. It can either file an appeal which suspends the decision of the Commission while the appeal is being 'long drawn out' by the railroad interested, or it can change the rate to 49½ cents, and when that has been declared unreasonable can change it again to 49¼ cents, and when that has been declared unreasonable can change it to 49⅓ cents, and

so on *ad infinitum*, compelling the newly aggrieved citizen in each case to bring suit, at the risk of being punished industrially by the railroad for what it calls 'unfriendly conduct,' and without the hope of any substantial immediate redress.

"A bill to give the Interstate Commerce Commission power, not to declare rates generally, not to fix a schedule of rates for all the roads in the country engaged in interstate commerce, but power to declare a reasonable rate in its stead in particular cases where a rate established has been declared unreasonable, this rate to be maintained until set aside by law, has been pending before the Committee on Interstate and Foreign Commerce in the House of Representatives since this Congress met."

Rates must be Reasonable—In Fixing Rates Commission must Act on Competent Evidence.—A carrier must charge for transportation of freight and passengers reasonable rates. Such rates may be fixed within the limits of a State by its Board of Railroad Commissioners, who have power to prescribe reasonable rates to be charged by the carrier. But in fixing rates the Commission must act upon evidence disclosing all material facts and circumstances relating to the subject. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167.

The Railroad Commission of South Dakota having power to fix rates, the statute providing that the maximum rate of transportation for passengers and property within the State should not exceed three cents per mile, published its schedule of maximum charges. Plaintiff sought by suit in United States Circuit Court to procure an injunction to restrain the enforcement of the schedule. Evidence was taken upon the pleadings and after a hearing the court made its findings of fact, conclusions of law and rendered an opinion dismissing the bill and refusing an injunction. On appeal to United States Supreme Court *held* that the court below erred in failing to find the cost of doing the local business; that whether the rates fixed were reasonable depended on proof as to the gross receipts, and the cost of doing business so as to ascertain the net earnings of the carrier; that the true effect of a reduction in rates can be ascertained only by a comparison with the net earnings; that the court should have taken the proof with the aid of a competent and reliable master, general, or special one capable of making all needed computations so that the court in making its findings may have the

benefit of the master's work. Case remanded for fuller hearing before a master court below to proceed on master's report. *Ib.*

Elements Considered to Determine Reasonable Rates.—The duty conferred upon the Commission although it does not authorize it to fix rates requires it to determine the question of fact as to whether or not a rate complained of is or is not reasonable. The Commission, in passing upon this question, have been frequently commended by the court for their skill and absolute fairness to all parties and for the thoroughness of their investigations. In passing upon the question of reasonableness the Commission will consider all the elements involved. The following list will give some idea of the considerations which may be considered :

- | | |
|------------------------------------------|----------------------------------------------------|
| 1. Amount of through and local business. | 19. Operating expenses. |
| 2. Bonded debt. | 20. Other articles consumed. |
| 3. Bulk. | 21. Population along the line. |
| 4. Character of commodity. | 22. Proportion to local traffic. |
| 5. Comparison of rates. | 23. Relative reasonableness of rates. |
| 6. Competition. | 24. Relative amount of through and local business. |
| 7. Consequences of rate changes. | 25. Return loads. |
| 8. Cost of production. | 26. Revenue. |
| 9. Cost of service. | 27. Rates <i>prima facie</i> . |
| 10. Cost of local business. | 28. Risk. |
| 11. Distance. | 29. Special train service. |
| 12. Dividend on capital stock. | 30. Storage capacity. |
| 13. Empty cars. | 31. Unsettling of rates. |
| 14. Fixed charges. | 32. Use to the public. |
| 15. Former rates. | 33. Value of freight. |
| 16. Geographical situation. | 34. Volume of business. |
| 17. Initial expenses. | 35. Weight. |
| 18. Market cost. | |

Testimony not Compulsory Prior to 1893.—Prior to the act of February 11, 1893 (chap. 83, 27 Stat. 443), *supra*, there was no provision of law broad enough to secure immunity to a witness who gave testimony which might tend to criminate him. Section 860 of the United States Revised Statutes it was held

was not broad enough to secure immunity, because it does not provide immunity from prosecution. The section is as follows:

Sec. 860. "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *Provided*, That this section shall not exempt any party or witness from prosecution for perjury committed in discovering or testifying as aforesaid."

It was held, in *Counselman v. Hitchcock* (January, 1892), 142 U. S. 547, that this section was not broad enough to secure absolute immunity to a witness who might give evidence tending to incriminate himself. That the section could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court.

"It could not prevent," says BLATCHFORD, J., "the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Charles Counselman, in November, 1890, was summoned before the grand jury (U. S. Dist. Ct. No. Dist. Ill.) in a proceeding to investigate certain alleged violations of the Interstate Commerce Act, which he refused to answer. Among the questions were the following:

Q. Have you, during the past year, obtained a rate for transportation of your grain on any of the railroads coming to Chicago from points outside of this State less than the tariff or open rate? A. That I decline to answer on the ground that it might tend to criminate me.

Q. During the past year, have you received rates upon the Chicago, Rock Island and Pacific from points outside of the State to the city of Chicago at less than the tariff rates? A. Same answer.

Q. Do you know any person, corporation, or company who has obtained their transportation of grain from points or places in the States of Iowa, Nebraska, or Kansas to the city of Chicago over the Chicago, Rock Island and Pacific railroad during the past year at a rate and price less than the published and legal tariff rate at the time of such shipment? A. Same answer.

The court committed the witness for contempt for refusing to answer. Counselman sued out a writ of *habeas corpus*, which after hearing was discharged, and the prisoner was remanded to the custody of the marshal. On appeal, the decision of the Circuit Court discharging the writ was reversed, and the case remanded with instructions to discharge the appellant from custody. *Counselman v. Hitchcock* (January, 1892), 142 U. S. 547.

After the decision in the *Counselman* case Congress passed the act approved February 11, 1893 (chap. 83, 27 Stat. 443), *supra*, which took away the right to prosecute the witness on account of anything concerning which he might testify.

Witness must Answer.— The first case to reach the Supreme Court under the act of February 11, 1893, was *Brown v. Walker* (March, 1896), 161 U. S. 591. The statute was held sufficient. A witness subpoenaed to attend before the Interstate Commerce Commission and testify in a cause or proceeding growing out of an alleged violation of the Interstate Commerce Act must answer all pertinent questions, and will not be excused from testifying for the reason that the testimony may tend to criminate him because the statute as amended (act approved February 11, 1893) affords the witness absolute immunity against prosecution for or on account of any transaction, matter, or thing concerning which he may testify. *Brown v. Walker*, 161 U. S. 591.

The grand jury was investigating a charge against the Allegheny Valley Railroad Company for alleged discrimination in favor of the Union Coal Company by giving it rebates, drawbacks, or commissions on coal transported for it. The petitioner Brown was subpoenaed and testified that he was the auditor of the railroad company and it was his duty to audit the accounts of the company's officers as well as the accounts of the freight department. He was asked:

“Q. Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company during

the months of July, August, and September, 1894 and 1895, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?"

He was also asked if he knew whether his company, during the year 1894, paid to the Union Coal Company any rebate, refund, or commission on coal transported by it whereby the coal company obtained transportation between said terminal points at a less rate than the open tariff rate. If you know, state amount of such rebates, drawbacks, or commissions paid, to whom paid, date of same, on what shipments, and all particulars within your knowledge of such transactions.

Witness refused to answer on the ground that such answer would tend to accuse and criminate himself. The court ordered the witness to show cause why he should not answer or be adjudged in contempt. The court, on the return of the order, overruled the objection of the witness and directed him to answer. Witness refused, and was adjudged in contempt, fined, and committed. He sued out a *habeas corpus*, and upon the hearing the writ was dismissed and the prisoner remanded. On appeal to the United States Supreme Court the judgment was affirmed. The court held that the statute afforded the witness complete immunity, not on account of any crime concerning which he might testify, but the immunity extended to any transaction, matter, or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had. *Ib.*

Books and Contracts must be Produced.— The authority in the above case (*Brown v. Walker*, 161 U. S. 591), was followed under the provisions of the Elkins Act of February 19, 1903, in the case of *Interstate Com. Co. v. Baird*, 194 U. S. 25. The language of the Elkins Act is even broader than the language of the act of February 11, 1893, in that the Elkins Act includes within its purview not only the witness, but also the corporation complained against, or which possesses the books and papers sought to be used in evidence. It declares not only that the witness testifying shall not be excused, but also that *such corporation*

shall not be excused "from producing its books and papers." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

In the *Baird* case the Supreme Court construed the law with reference to the scope of the powers of the Commission to inquire into the mode in which interstate commerce is conducted, and confirmed its authority to compel the production by the carrier not only of its books and papers, but of all contracts made by it which tend to show in what manner its traffic is conducted, the relations between carrier and carrier, and between the carrier and the shipper, and the rates charged and collected. It has been claimed that these contracts showed that the carriers were also miners and producers of coal. That they contained provisions whereby secret rebates and advantages were given to certain shippers (*i. e.*, to the carriers themselves), which were denied to others, which enabled the favored shippers to undersell their competitors, drive them out of business, and build up a monopoly in trade and commerce at the expense of the public and with the aid and participation of the carrier. Former investigations and inquiries by the Commission have frequently failed because the Commission was unable to secure the evidence upon which the trust, monopoly, or unjust discrimination could be established by legal proof.

The decision in the *Baird* case has established the right of the Commission to an inspection of these contracts, and pointed out the mode in which they may be put in evidence. It goes further and declares that "any person," under section 13 of the Interstate Commerce Act, may complain of anything done, or omitted to be done, under the act. It further declares that "no complaint shall be dismissed because of the absence of direct damage to the complainant." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

Mode of Securing Evidence — Coal Contracts.—The method of procedure in the *Baird* case in which the Supreme Court directed that carriers must produce their books, papers, documents, and contracts to be used as evidence, grew out of a complaint made by William Randolph Hearst filed with the Interstate Commerce Commission November 2, 1902. Mr. Hearst was not a shipper or dealer in coal. He instituted his inquiry

as a citizen for his own benefit, and for the benefit of the general public, necessarily purchasers and consumers of coal. The object of the complaint was, assuming its allegations to be well founded, to secure a decision declaring that dealers in anthracite coal were guilty of an unlawful conspiracy and combination, and were guilty of unjust discrimination against shippers in the mining and sale of coal. The complaint was against ten carrying companies who were made defendants, to-wit: Philadelphia and Reading railroad, Lehigh Valley, Delaware, Lackawanna and Western, Central railroad of New Jersey, New York, Susquehanna and Western, Erie railroad, New York, Ontario and Western, Delaware and Hudson, Pennsylvania railroad, and Baltimore and Ohio. It was alleged that these carriers were engaged in interstate commerce in carrying coal from one State into other States. That in violation of the provisions of the Interstate Commerce Act they charged and exacted unjust and unreasonable rates for carrying coal from Pennsylvania into New York and New England and other States, and subjected producers and consumers of coal to undue and unreasonable prejudice and disadvantage, to the disadvantage of such producers and consumers, and to the undue and unreasonable preference and advantage of defendants in violation of sections 1 and 3 of the act. That the rates of transportation charged by defendants were unreasonable and unjust, and unjustly discriminated against the interests of dealers and consumers in violation of section 2, and that defendants violated section 4 of the act by charging more for a short than a long haul. That defendants, in the absence of any trust agreement, were respectively natural competitors, being substantially parallel lines, and that six of the defendant carriers pooled their freight in violation of section 5 of the act. Complainant prayed that defendants be compelled to answer the charges, and for an order commanding them to desist and cease each and every violation of the act.

Defendants filed their answers and the Commission proceeded to inquire as to the truth of the charges. In the course of the investigation defendants were asked to produce the contracts referred to in the complaint and to answer certain questions in relation thereto. Defendants, their officers, agents, and servants refused to answer the questions or produce the contracts, and

their counsel denied the power and authority of the Commission to compel them to do so.

The Commission then prepared a petition to the Circuit Court of the United States for the southern district of New York, and requested the Attorney-General of the United States to present it pursuant to the provisions of the Elkins Act of February 19, 1903. The Attorney-General thereupon instructed the United States District Attorney for the southern district of New York to present the petition and procure an order directing the witnesses to attend before the Commission, answer the questions, and produce the contracts, to be marked in evidence.

Defendants claimed that the witnesses could not be compelled to testify or produce the contracts and claimed immunity under the Fourth, Fifth, and Tenth Amendments to the Constitution. Defendants claimed further that the contracts (which were produced for inspection merely) were not in any way relevant to the subject of the inquiry.

The court dismissed the petition solely on the latter ground that the contracts, in the judgment of the court, contained no material or relevant testimony, as they related only to the sale of coal in the State of Pennsylvania, which was a matter of domestic trade and did not concern interstate commerce. An appeal was taken directly to the Supreme Court under the "Expedition Act" of February 11, 1903, authorizing such an appeal in any case in which the United States is complainant or which is brought under the direction of the Attorney-General of the United States. The order of the Circuit Court was reversed (BREWER, J., alone dissenting) on the ground that the contracts sought were material and necessary in aid of the inquiry, to enable the Commission to obtain full and complete information upon which to frame its judgment and promulgate its orders in the discharge of its duties under the act.

Coal Contracts Relevant.—As to the relevancy of the contracts to the inquiry pending the court held that the testimony disclosed the fact that the carriers who made the contracts were also miners and owned and controlled the mines from which the coal which they carried was produced. That, while some of the coal was sold in Pennsylvania, much of it was carried to

tide water and sold in other States. That the parties who made the contracts were officers of the carrying companies and were also officials of the mining companies, and while the contracts were in form for purchases of coal "their real purpose was to fix a rate for transportation." That the rate of compensation to the carrier was made to depend upon the price of coal in the open market. That if the carrier received its freight from a sum retained by the coal companies then whether they received more or less than the published rate depended on the price of coal. That the evidence showed that the coal was paid for at tide water by the consignees (who were companies owned by defendant carriers) on the basis of 65 per cent. of the general average price received at tide water by the sale of sizes above pea coal, leaving 35 per cent. for the purchaser, from which he must pay the transportation charges and cost of sale. In other words when the carrier, which was also the miner and producer, sold its coal to its own companies designated in the contract, it retained 65 per cent. of the market price of the commodity as the price it charged for the coal. This would leave 35 per cent. to be paid to the carrier as the cost of transportation. Thirty-five per cent. of the selling price of coal at the time the complaint was filed was the freight rate which the consignee paid the carrier. The evidence showed that this sum which the companies paid the carrier for freight was less than the published rate. If this evidence was correct then the defendants charged their own companies less for carrying their coal than they charged competing dealers and coal merchants who were not interested in the companies favored by the carrier and named in its contracts. It would thus appear that the amount paid for freight by the favored shipper "would work a discrimination against coal companies not having special contracts with the carrier, and who were obliged to pay the full published tariff rate. On the other hand, if the favored companies paid the full rate from their 35 per cent., they would lose money, and as they were owned by the railroad companies the loss would be ultimately theirs and not the coal companies."

The court held, accordingly, that while the Commission might ultimately find that the contracts did not fix the compensation received by the carriers and that the companies referred to in the

contracts paid the published tariff freight rate and that the loss, if any, is made up on other business, the contracts were nevertheless relevant to the matters which were the subject of the inquiry, whether the Commission finally established the issue made, one way or the other. (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

Coal Trust Case — Constitutional Objections Untenable.—

The court in the *Baird* case held that the constitutional objections raised were wholly untenable. The provisions of the Elkins Act of February 19, 1903, re-enacts in an amplified form the provisions of section 12 of the Commerce Act with respect to self-incriminating testimony. The act declares that "the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation from producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding." In construing this clause, which is broader than the provisions of section 12, in that it embraces also the corporation required to produce books or papers, the court followed the previous decisions construing the language in section 12. *Brown v. Walker*, 161 U. S. 591; *Interstate Com. Co. v. Baird*, 194 U. S. 25.

With respect to the Fourth Amendment securing immunity from unreasonable searches and seizures the court followed the ruling in *Boyd v. United States*, 116 U. S. 616, and quoted from the opinion of Justice BRADLEY in that case as follows: "Breaking down a house and opening boxes and drawers are circumstances of aggravation, but any forcible or compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment."

"In this regard," says Mr. Justice DAY, "the Fourth and Fifth Amendments run almost into each other." And see *Adams v. People of State of New York* (192 U. S. 585), decided at this term. As we have seen the statute protects the witness from such use of testimony as will result in his punishment for crime

or the forfeiture of his estate. (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

Contempt.— A proceeding by the Interstate Commerce Commission, whereby it invokes the aid of a Circuit Court of the United States, to compel witnesses subpoenaed before the Commission to testify and produce books and papers, is a judicial proceeding to which the jurisdiction of the Federal court extends, and a refusal on the part of a witness to obey an order of the court directing him to testify or answer questions or produce books, papers, and documents, may be punished by contempt proceedings. *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

Immunity under Sherman Act.— It has been held that the immunity secured to witnesses under the act of February 11, 1893, applied only to proceedings instituted under the Interstate Commerce Act of February 4, 1887, and had no application to proceedings instituted under the Sherman Act of July 2, 1890. *Foot v. Buchanan*, 113 Fed. Rep. 156.

Under the act of February 25, 1903, however (Laws 1903, chap. 755), immunity is extended to witnesses testifying in proceedings instituted under the Sherman Act as well as under the Interstate Commerce Act. See *post*, page 297.

Immunity — Corporations.— The act of February 11, 1893, does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the grand jury and testify to facts which would tend to incriminate it or produce books and papers of the corporation bearing upon the offense of which it is charged. The immunity of the statute extends to witnesses who give testimony and cannot be extended to include the corporation the witness represents. *In re Pooling Freights*, 115 Fed. Rep. 588.

Trial by Jury — Contempt.— In a proceeding to punish a defendant for contempt of court for a violation of an injunction order the defendant is not entitled to a jury trial. The power of a court to make an order carries with it the power to punish for a disobedience of that order, and such inquiry has always been the special function of the court. To submit the question

of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. *In re Debs*, 158 U. S. 654.

If the court upon inquiry finds that its orders have been disobeyed it may proceed under section 725 of the Revised Statutes, which grants power "to punish by fine or imprisonment * * * disobedience * * * by any party * * * or other person to any lawful writ, process, order, rule, decree, or command," and enter the order of punishment complained of. A finding of fact in a proceeding to punish for contempt is not open to review in an appellate court on *habeas corpus* proceedings. *Ib.*

Trial by Jury.— A proceeding instigated by the Interstate Commerce Commission under the twelfth section of the Interstate Commerce Act, to compel witnesses to produce books and testify before it, in which they invoke a Circuit Court of the United States to use its process to compel such testimony presents a case or controversy within the judicial power of the United States. The issue in such a controversy, as to whether defendants in such a proceeding are under a duty to answer the questions propounded to them, and to produce the books, papers, and documents called for, presents no issue of fact, but solely a question of law, and is not a proceeding in which the defendant is entitled to a jury trial. In such a proceeding defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him as an officer to perform a ministerial duty. The power of the court to punish witnesses for contempt does not arise until the issue of law is decided adversely to defendant, and an order has been made requiring him to testify. Disobedience of the order may be punished as a contempt. In matters of contempt a jury is not required by "due process of law." *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

Depositions under United States Revised Statutes.— The mode in which depositions may be taken before the Interstate Commerce Commission is specially prescribed by section 12, *supra*. An action before a Federal court when a party sues independent of the Commission to enforce his rights for a violation of the Interstate Commerce Act, as to this mode of proof, would be governed by the United States Revised Statutes. The proof

must be either by oral testimony or upon depositions in actions at law, or in actions triable by jury. The provisions of the Federal statute in this regard are as follows:

Sec. 861. Actions at Law.— The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided.

Sec. 862. Suits in Equity.— The mode of procedure in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.

Sec. 863. Depositions.— The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

Sec. 914. State Court Practice.— The practice, pleadings and forms and modes of proceeding in civil cases, other than equity

and admiralty cases, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

Depositions under State Laws — Act of March 9, 1892.— The mode of taking depositions was further provided for by an act approved March 9, 1892 (27 Stat. 7), entitled “An Act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States.” The act declares “that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held.”

Held, that the act of 1892 does not modify section 861 of the United States Revised Statutes or create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions or testimony in writing. Nor does such act supplement the provisions of section 914, United States Revised Statutes. The courts of the United States are not given discretion to take depositions not authorized by Federal law, but in respect to depositions thereby authorized to be taken, they may follow the Federal practice in the manner of taking or that provided by the State law. *Hanks Dental Assn. v. Tooth Crown Co.* (May, 1904), 194 U. S. 303.

In the case cited, an action for damages for the infringement of a patent right, the sole evidence of infringement was found in the deposition of the president of the Hanks Dental Association, the plaintiff in error. This deposition was taken under an order of the United States Circuit Court, pursuant to the laws of the State of New York, section 870 *et seq.* of the New York Code of Civil Procedure, which declares that “the deposition of a party to an action pending in a court of record or a person who expects to be a party to an action about to be brought * * * may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article.” The taking of the

deposition was objected to at every stage. Plaintiff below had a verdict. A writ of error was taken to the United States Circuit Court of Appeals which certified to the Supreme Court the following question:

“Q. Was the order of the circuit court, directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of section 870 *et seq.* of the Code of Civil Procedure of the State of New York, valid and authorized under the act of March 9, 1892.”

The Supreme Court after reviewing the law and authorities (*United States v. Fifty Boxes*, 92 Fed. Rep. 601; *Nat. Cash Reg. Co. v. Leland*, 77 Fed. Rep. 242; *Texas & Pacific R. Co. v. Wilder*, 92 Fed. Rep. 953; *Shellabarger v. Oliver*, 64 Fed. Rep. 306; *Despeaux v. Pennsylvania Railroad*, 81 Fed. Rep. 897; *Zych v. American Car & Foundry Co.*, 127 Fed. Rep. 723; *Smith v. Northern Pacific Railroad*, 110 Fed. Rep. 341; *Camden Railway v. Stetson*, 177 U. S. 172; *Union Pacific v. Botsford*, 141 U. S. 250; *Luxton v. North River Bridge Co.*, 147 U. S. 337; *Tabor v. Indianapolis Journal*, 66 Fed. Rep. 423; *Seeley v. Kansas City Star*, 71 Fed. Rep. 554; *Ex parte Fiske*, 113 U. S. 713) answered the question in the negative, and held that the court had no power to subject the party to such an examination. *Ib.*

§ 13. Complaint to Commission, how Made — Investigations, how Conducted.— That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the

same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Complaints by State Railroad Commissions.— Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Object and Scope of Section 13.— This section defines the mode of instituting proceedings before the Commission, and defines what the petition of complainant must show, and power of the Commission to compel a written answer by the carrier. It makes it their duty to investigate any complaint properly brought before the Commission by any person, whether such complainant shall or shall not be able to establish direct damage or not. It makes it the duty of the Commission to institute any inquiry or investigation which it may deem proper of its own volition. It provides for reparation by an offending carrier, whereby it may be relieved from liability or obligation to comply with any order made against it. It defines the mode of procedure before the Commission and makes special provisions for com-

plaints filed by a Railroad Commission or Railroad Commissioners of any State.

Who may Invoke Enforcement of the Act — “Any Person.”

— The duty which the act imposes on the Interstate Commerce Commission is a public duty. It is a duty which involves the constitutional rights and privileges of the citizen. “Any person” may invoke the Commission to discharge that duty, which the law imposes, who files with it a proper petition or complaint setting forth a violation of the act, or of any of its provisions, whether that person be directly interested as a shipper or not; or whether the petitioner has or has not sustained any direct damage (April, 1904). *Interstate Com. Co. v. Baird*, 194 U. S. 25.

In the case cited, the petition was filed by William Randolph Hearst, against certain carriers engaged in carrying and transporting coal. The petitioner was not a shipper nor directly interested in shipping, mining, or selling coal. He did not claim to have suffered direct damage, but complained as a citizen to compel the carriers referred to in his petition to cease and desist from violating the various provisions of the Interstate Commerce Act, as set forth in his complaint. Defendants raised the question as to the right of the complainant to institute any proceeding, investigation, or inquiry under the act. On this point the court said: “It is provided in the act to regulate commerce, section 13, that ‘Any person, firm, corporation, etc., complaining of anything done, or omitted to be done, by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition,’ etc. And certain procedure is provided for, and (said Commission) ‘may institute any inquiry on its own motion, in the same manner and to the same effect as though complaint had been made,’ and the section concludes: ‘No complaint shall, at any time be dismissed because of the absence of direct damage to the complainant.’”

“In the face of this mandatory requirement,” says Mr. Justice DAY, “that the complaint shall not be dismissed because of the want of direct damage, to the complainant, no alternative is left the Commission but to investigate the complaint if it presents matter within the purview of the act and the powers granted to the Commission.” *Id.*

§ 14. Report of Commission, how Made.— That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Report, how Published.— The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports. (*As amended March 2, 1889.*)

Object and Scope of Section 14.— This section provides for the reports which the Commission must make, and the findings of fact upon which the conclusions arrived at in any report are based, and declares that such findings shall be *prima facie* evidence of the facts found. The section also declares how the reports of the Commission may be published, and makes official reports evidence without further authentication.

Commission are Experts.— Whether the great Commission to which Congress has primarily intrusted the important duty imposed upon it, is or is not to be regarded as technically experts is not open to question, in view of the fact that they are authorized to execute and enforce, through the Federal courts, the provisions of the Interstate Commerce Act. The findings of that body are declared to be *prima facie* evidence of the matters therein stated, and are entitled to the highest consideration, and if its orders based thereon are in conformity with the law they must be enforced. *Interstate Com. Co. v. Louisville*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

Burden of Proof — Findings of Commission Prima Facie Evidence.— The findings and conclusions of the Interstate Commerce Commission, upon the testimony taken by it, are *prima facie* evidence of the facts therein contained, and are presumed to be correct. A finding that charges made by the carrier are unreasonable and unjust throws upon the carrier the burden of proof to sustain its claim that such findings are erroneous. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

§ 15. Commission to Notify Carrier of Violations of Law — Compliance of Carrier, Effect of.—That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from

such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Object and Scope of Section 15.—This section provides for the judgments and orders which the Commission may make as a result of its inquiry and investigation. If it finds that the carrier has violated any of the provisions of the statute after a hearing, upon legal evidence, it is authorized to issue a mandatory order directing the carrier “to cease and desist from such violation.” If damage has been sustained the Commission may require reparation to be made. It also provides that the carrier be relieved from liability upon compliance with the order.

§ 16. Disobedience of Carrier, how Punished.—That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary

way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue [Power of Court to Issue Injunction] a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same.

And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue [Mandamus — Attachment] writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, [Per Diem Penalty not to Exceed \$500] to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court.

Appeal to United States Supreme Court.—When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before

said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Trial by Jury.— If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of

said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid.

At the trial of the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties [**Jury may be Waived**] shall waive a jury in writing then the court shall try the issues in said cause and render its judgment thereon.

If the subject in dispute shall be of the value of two thousand dollars or more either party may [**Appeal to U. S. Supreme Court**] appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session. (*As amended March 2, 1889.*)

§ 16 Supplemented — Act to Expedite Cases, Approved February 11, 1903.— The method of procedure in the Federal Courts in suits and hearings under the Interstate Commerce Act, and the Sherman Anti-Trust Law (Act of July 2, 1890) are regulated by the provisions of an Act of Congress, approved February 11, 1903 (chap. 544), entitled “An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies,’ ‘An Act to regulate commerce,’ approved February 4, 1887, or any other acts having a like purpose, that may hereafter be enacted.” The provisions of this Supplemental Act of February 11, 1903, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July second, eighteen hundred and ninety, “An Act to regulate commerce,” approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. [~~Preference over Other Cases.~~] Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or

more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

Appeal Directly to Supreme Court.—§ 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law. (*Act of February 11, 1903, § 2.*)

Object and Scope of Section 16.— This section provides for the enforcement of any order or requirement made by the Interstate Commerce Commission, in conformity with section 15. The Commission is not clothed with judicial powers, and cannot for that reason compel obedience to its mandates. But it may invoke the aid of a Federal court and enforce its orders through such tribunal. The method of procedure by the Commission is prescribed, and jurisdiction and plenary powers are conferred upon the court to take cognizance of such proceedings and enforce them, when sustained by legal mandate. The findings of fact made by the Commission are made *prima facie* evidence in the proceeding before the Circuit Court of the United

States, and the burden of proof is upon the defendant who assumes to disobey the order of the Commission.

The powers conferred on the court embrace authority to issue writs of attachment, injunction, and "other proper process, mandatory or otherwise," and power to punish for contempt. It also provides the procedure on appeals, either to the Circuit Court of Appeals or directly to the Supreme Court of the United States. In this regard the provisions of the act of February 11, 1903, to expedite cases under this section, and the provisions of the Elkins Act of February 19, 1903, add to the force and efficiency of the provisions of this section by making it practicable, and the remedy speedy and effective. Provision is made also for jury trials where the right to a jury trial exists, under the Constitution, and has not been waived.

Findings of Fact by Commission.— The findings of fact made by the Interstate Commerce Commission in proceedings taken before it to secure an order forbidding the carrier to charge unjust and unreasonable rates, are not conclusive upon the court, upon a petition of the Commission for an injunction to enforce its order after refusal by the carrier to obey it. Such findings are authorized by the statute, which in terms declares that they shall be *prima facie* evidence only of the facts found. The legal effect of such findings would throw the burden of proof on carrier in a proceeding for an injunction in the Federal court, where the carrier opposes the application and denies the facts found against it. *Interstate Com. Co. v. Lehigh Railroad*, 49 Fed. Rep. 177; *Kentucky Bridge Co. v. Louisville Railroad*, 37 Fed. Rep. 567.

No greater force can be given to the findings of the Commission than is given by the statute, which authorizes such findings and confers the power and authority to make them. *Ib.*

Appeals Directly to Supreme Court.— Prior to the legislation of 1891, creating the United States Circuit Court of Appeals, there was no intermediate appellate tribunal, and appeals were required to be taken from Circuit Courts of the United States directly to the Supreme Court, when the subject in dispute was of the value of \$2,000 or more.

Since the establishment of the United States Circuit Court of Appeals an appeal lies to that court, except that under the provisions of the act of February 11, 1903, and the Elkins Act of February 19, 1903, appeals must be taken directly to the Supreme Court of the United States in cases where the United States is complainant, and an appeal to the Circuit Court of Appeals in such a case will not lie.

Under section 7 of the Sherman Act the limitation of \$2,000 is no longer necessary to enable a party to sue, or to appeal, either to the Circuit Court of Appeals, or to the Supreme Court of the United States. Such an action may be brought and an appeal taken irrespective of the amount involved. *Montague v. Lowry*, 193 U. S. 35.

See also authorities under section 9, *ante*, page 171.

Appeals to Supreme Court Prior to 1891.— Under section 16, prior to the establishment of the United States Circuit Court of Appeals, an appeal would lie in a suit by the Interstate Commerce Commission, to enforce its order from a Circuit Court of the United States to the United States Supreme Court, if the subject in dispute shall be of the value of \$2,000 or more.

If the action was one triable by jury, or if a jury trial has been duly waived, such appeal was required to be taken within twenty days from the day of the rendition of the judgment of the Circuit Court. Where the suit was to enforce an order of the Commission, for refusal to afford complainant "the same equal facilities, as are afforded to any other connecting road," and for other relief, the Circuit Court dismissed the bill for want of equity. An appeal was taken by complainant directly to the Supreme Court. *Held*, that the appeal would not lie unless it clearly appeared that the subject in dispute shall be of the value of \$2,000. Appeal dismissed. *Little Rock & Memphis v. East Tennessee*, 159 U. S. 698 (December, 1895), citing *Interstate Com. Co. v. Atchison Railroad*, 149 U. S. 264.

Jurisdiction over All Carriers for Breach by One — Proper District.— A number of railroads were forbidden by an order of the Interstate Commerce Commission from enforcing rates found to be illegal, for transportation between Pueblo, Col., and San Francisco, Cal. The Commission found that the freight was car-

ried "under a common control, management, or arrangement for a continuous carriage or shipment." The order was violated in the district of Colorado, by the Southern Pacific having its principal office in California. The suit was brought in the district of Colorado. Section 16 of the act provides that suit by the Commission to enforce its order may be instituted "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen." *Held*, that where all the roads operated under a common control in making the forbidden rates, the act of one in the district where the disobedience of the order happens is the act of all, and the violation by all took place in the district of Colorado as well as in the district of California. *Interstate Com. Co. v. Southern Pacific*, 74 Fed. Rep. 42 (May, 1896, Cir. Ct. Dist. Colo.).

All doubt as to the proper district in which suit may be brought is removed by the provisions of section 3 of the Elkins Act, which declares that "when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State." See Elkins Act, section 3, *ante*, page 137.

See also authorities under "Jurisdiction" under section 9, *ante*, pages 154, 155.

Order of Commission — Terminal Charges — When not Enforced.—An order of the Interstate Commerce Commission declared that terminal charges of a carrier for the delivery of live stock to the stockyards in Chicago were unjust and unreasonable, and a violation of the Interstate Commerce Act. The court below refused to enforce the order of the Commission upon the ground that the claim that the charges were unreasonable could not be sustained. On appeal, *held*, that the through rate existing prior to June 1, 1894, was presumed to provide compensation for services in making delivery at the stockyard, and while the judgment appealed from should be affirmed, yet the Commission should not be prevented from proceeding to correct unreasonableness in the rates as to territory to which the reduction did not apply. *Interstate Com. Co. v. Chicago, B. & Q.*

R. Co., 186 U. S. 320. Citing *Covington Stockyard Co. v. Keith*, 139 U. S. 128; *Walker v. Keenan*, 73 Fed. Rep. 755.

Parties.— In a proceeding by the Interstate Commerce Commission under section 16 to enforce an order made by the Commission directing the carrier to desist and cease from charging rates declared to be in violation of the act, the Commission need not necessarily join as a party to the proceeding another carrier, who has made the forbidden rate, jointly with the defendant. Such carrier is a proper, but not a necessary, party. *Interstate Com. Co. v. Texas Railroad*, 52 Fed. Rep. 187 (October, 1892, Cir. Ct. So. Dist. N. Y.).

Damages — Trial by Jury.— If a shipper seeks redress before the Interstate Commerce Commission for charges paid to the carrier in excess of what was paid by other shippers for a like service under section 2 of the act, and procures an order from the Commission directing the carrier to desist from exacting such unlawful charges, he may enforce the order through the Commission by a suit in equity by injunction under section 16. But if the amount of the excessive charges are proved and the Commission makes an order directing the carrier to make reparation and restitution, and to refund the amount by way of damages, so much of the order as directs restitution cannot be enforced in the equity action. The portion of the order directing payment of damages can be enforced, if at all, only in an action at law in which the carrier is entitled to a jury trial. *Interstate Com. Co. v. Western New York Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

Remedy by Injunction.— A shipper who has been discriminated against and has been obliged to pay charges on shipments in excess of what the carrier charged other shippers for a like service, is not obliged to seek a remedy at law to recover the excessive payments by way of damages. He may seek redress before the Interstate Commerce Commission and secure an order directing the carrier to cease from exacting the unlawful charges and enforce the order by injunction in a suit in the Circuit Court of the United States. *Interstate Com. Co. v. Western New York Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

If the remedy sought is by injunction in equity, the court has no power to enforce so much, or such parts, of the order of the Commission as directs reparation, or refunding to claimants, by way of damages, the excessive charges proved before the Commission. If such orders directing reparation are enforceable at all, they must be enforced in an action at law in which the carrier will be entitled to a jury trial. So held, where the Commission found the amount of the excessive charges on shipments of oil from Titusville and Oil City, Pa., to New York and elsewhere. *Ib.*

§ 17. Procedure before Interstate Commerce Commission.— That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas. (*As amended March 2, 1889.*)

Object and Scope of Section 17.— This section makes the procedure before the Commission analogous to proceedings in a

court of record as near as may be by declaring that it shall have an official seal of which the courts will take judicial notice. Parties may appear before it in person or by attorney. Forms used before the Commission shall conform, "as nearly as may be, to those in use in the courts of the United States." The Commission may make rules of procedure, and amend or modify them. It may amend or modify its orders. It may administer oaths or affirmations to witnesses, and may issue and sign subpoenas. Its records shall be public records, accessible to any person in like manner as the records of a court.

§ 18. Salary of Commission — Fees and Expenses.—That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission. (*Amended March 2, 1889.*)

Object and Scope of Section 18.— This section provides for the salaries of the Commissioners. The Commission has power to appoint a secretary, and to employ and fix salaries of employees. Witness fees and mileage are the same as are allowed in the Federal courts.

Disbursements of Commission.— Section 18 declares that “all expenses of the Commission * * * shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Chairman of the Commission.” By the Appropriation Act for the same (Supp. Rev. Stat. (2d ed.) 698) it is provided “that hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury.” *Held*, that the Secretary of the Interstate Commerce Commission was entitled to pay for moneys expended for telegrams sent by the Commission in the discharge of its duties upon presentation of vouchers showing cost of each telegram, dates, number of words, persons from and to whom sent, and charge for each message transmitted in the form prescribed by statute without furnishing copies of such telegrams, when it appears that such messages are so far confidential as to justify a refusal to disclose their contents. *United States v. Moseley*, 187 U. S. 322.

§ 19. Sessions of Commission, where Held.— That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Object and Scope of Section 19.— This section provides for the sittings and sessions of the Commission, and the location of

its principal office, which shall be in the city of Washington. But it may, by one or more of its Commissioners, sit anywhere in the United States.

§ 20. Carrier must Make Annual Reports — Contents — Uniformity of Accounts.— That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail —

The amount of capital stock issued;

The amounts paid therefor, and the manner of payment for the same;

The dividends paid, the surplus fund, if any, and the number of stockholders;

The funded and floating debts and the interest paid thereon;

The cost and value of the carrier's property, franchises, and equipment;

The number of employees and the salaries paid each class;

The amounts expended for improvements each year, how expended, and the character of such improvements;

The earnings and receipts from each branch of business and from all sources;

The operating and other expenses;

The balances of profit and loss;

And a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet.

Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require;

And the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

§ 20 Supplemented — Act of March 3, 1901 — Monthly Reports of Accidents.— The provisions of the Interstate Commerce Act with respect to annual reports required to be made by carriers annually has been supplemented by an Act of Congress (chap. 866), approved March 3, 1901, requiring monthly reports of railroad accidents. The Act is entitled “An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission.” The provisions of this supplementary Act are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, [**Monthly Reports of Accidents**] a monthly report, under oath, of all collisions of trains or where any train or part of a train accidentally leaves the track,

and of all accidents which may occur to its passengers or employees while in the service of such common carrier and actually on duty, which report shall state the nature and causes thereof, and the circumstances connected therewith.

§ 2. **Penalty, Misdemeanor.**— That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor and, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same.

§ 3. **Reports not to be Used in Evidence.**— That neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad so making such report in any suit or action for damages growing out of any matter mentioned in said report.

§ 4. **Forms of Reports.**— That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports in the foregoing section provided.

Object and Scope of Section 20.— The provisions of this section are extremely important. It furnishes the basis of data, and information as to the mode in which the commerce of the country is conducted, and gives the Commission power to compel all interstate carriers to make reports to it from time to time. These reports will, if properly prepared, reveal the financial condition of the corporation. The financial operations of the carrier must be furnished annually. Agreements or contracts

among carriers may also be required to be produced for the inspection of the Commission. A uniform system of accounts by carrying corporations may also be required under this section.

Similar powers to those conferred by section 20 are now conferred upon the Commissioner of Corporations under the control of the Secretary of Commerce and Labor as to all corporations doing interstate business, except common carriers. In other words, the powers of section 20 of the Interstate Commerce Act, which relates exclusively to carriers, has been extended to the Commissioner of Corporations, with respect to all other corporations, joint-stock companies, or industrial combinations engaged in interstate commerce. For the provisions of law governing the power of the Commissioner of Corporations, see chapter III, *post*.

Report, when not Compulsory — Domestic Commerce.— The Commission, under section 20, can require reports only from carriers engaged in interstate commerce. A railroad wholly within one State which ships freight destined to other States upon local bills of lading only, under a special contract of carriage limited to its own line, which does no business on through rates, nor divide through charges with connecting carriers, nor assume any obligation to or from them, is not engaged in interstate commerce, and a *mandamus* will not lie to compel it to file any report with the Interstate Commerce Commission under section 20 of the act. *United States ex rel. Interstate Com. Co. v. Chicago Railroad*, 81 Fed. Rep. 783 (June, 1897, Cir. Ct. West. Dist. Mich. S. D.).

§ 21. Commission to Make Annual Reports to Congress.— That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation re-

lating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission. (*As amended March 2, 1889.*)

§ 22. Free or Reduced Rates — Excursions — Mileage — Commutation Rates — Remedies Cumulative.— That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the

provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act. (*As amended March 2, 1889.*)

Provided further, That nothing in this act shall prevent the issuance of joint interchangeable [**5,000 Mile Tickets**] five-thousand mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint inter-

changeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. [Penalties.] The provisions of section ten of this act shall apply to any violation of the requirements of this proviso. (*Added by Laws 1895, chap. 61; approved February 8, 1895.*)

Object and Scope of Section 22.— This section is designed to regulate the conduct of interstate commerce with respect to free transportation, and special rates when a reduced rate fare may be charged. The object sought is to place all patrons on an equality. The only instances in which the carrier may lawfully depart from the published tariff rates are regulated and defined in this section.

One of the most important parts of the section is that which declares that all the remedies afforded to the shipper or person injured by any violation of the provisions of the act shall be cumulative, and not exclusive. This provision is most important in view of the fact that the Interstate Commerce Act is, in some respects, a penal statute, and strict construction of its provision might deprive it of its beneficial interests and purposes. It was intended partly as a penal, partly as a remedial, statute, and was primarily designed to afford a remedy to shippers and persons who are compelled to deal with the carrier. Congress, in enacting section 22, has expressly declared all remedies existing at common law, or by statute, shall not be altered or abridged, but that the remedies afforded by the Interstate Commerce Act "are in addition to such remedies."

Remedy Cumulative.— The Interstate Commerce Act created no new right in the shipper. At common law the common carrier was bound to receive and transport all goods offered on receiving reasonable compensation for such carriage. The carrier at common law could not lawfully enforce unreasonable charges. The difference in the obligation of a common carrier and an individual is, that the former has undertaken a duty to the public. And that duty imposed upon him the obligation

to carry for all to the extent of his capacity without unjust or unreasonable discrimination, either in charges or in the facilities for actual transportation. SPEER, D. J., So. Dist. Ga., in *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; citing *Atchison R. Co. v. Denver R. Co.*, 110 U. S. 667; *Interstate Com. Co. v. Cincinnati R. Co.*, 167 U. S. 479.

This common-law obligation of the carrier is even stronger upon carriers who receive valuable franchises from the public. The universal reliance of the public on the instrumentalities of modern commerce renders their operation indispensable to the existence of modern social life. The act of Congress, in so far as it prohibits and forbids the carrier from imposing unjust and unreasonable rates, is an express adoption of the rules of the common law in this regard. By embodying this common-law right in the statute, Congress created no new right in the shipper, but provided for him a remedy in the Federal courts. The object of Congress was to facilitate interstate commerce, and restrict the arbitrary power of the common carrier. *Ib.*

The intention of the act was not to deprive the shipper of any right which he might have had or invoked in any court prior to the passage of the act. The intention clearly was to facilitate the shipper in securing such right by creating new and special remedies for that purpose. And these remedies were intended to supplement and not to supplant the remedies which existed before the act of Congress. These remedies being supplemental to those formerly existing must be deemed to be cumulative and not exclusive, and section 22 of the act expressly so declares, creating a remedy by *mandamus* which is particularly designated as a cumulative remedy. *Ib.*

The section cited also declares broadly that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by the act, the provisions of which are extended by the act of February 19, 1903, so as to authorize the government of the United States, at the instance of the Attorney-General of the United States, either of his own motion

or at the request of the Interstate Commerce Commission, to enforce the remedies of the act by proceedings instituted by the United States District Attorney in the proper locality. And such new remedies under the act of February 19, 1903, are retroactive and apply to actions or proceedings which were pending at the time of the passage of the amending act. *Missouri Pacific R. Co. v. United States*, 189 U. S. 274.

Free Passes.— A carrier who grants a free pass or otherwise furnishes free transportation over its interstate lines, except upon the terms and conditions and in the manner provided in section 22 of the act, is guilty of a misdemeanor. The granting of such passes is unlawful and in violation of the provisions of sections 2 and 3 of the act. *In re Charge to Grand Jury*, 66 Fed. Rep. 146 (February, 1895, Dist. Ct. No. Dist. Cal.).

The provisions of section 22 of the act authorizing free passes or reduced rates to particular persons and to officers and employees of the carrier engaged in interstate commerce do not include the families of such persons, and a receiver of the carrier's road will be instructed that he is not authorized to give such passes. *Ex parte Koehler*, 31 Fed. Rep. 315 (July, 1887, Cir. Ct. Dist. Oregon).

Party-rate Tickets.— The Interstate Commerce Act was designed to secure equality among shippers and passengers, but was not intended to prevent competition between different carriers, or to interfere with customary arrangements among carriers for reduced fares in consideration of increased mileage where the discrimination was not unjust. Nor to ignore the principle that one can sell at wholesale cheaper than at retail. A discrimination to fall within the statute must be "unjust;" a discrimination must be "unfair" or unreasonable.

"Party-rate Tickets," whether regarded as commutation tickets or not, whereby the carrier gives to ten or more persons a reduced rate, do not constitute unjust discrimination or undue or unreasonable preference. Theatrical companies, or any number of persons exceeding ten, may have the benefit of this reduced rate. "A commutation ticket is issued to induce people to travel more frequently; party-rate tickets are issued to induce more people to travel." "Party-rate tickets are lawful, and

their sale by a competing road is not a violation of the Interstate Commerce Act." *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263.

§ 23. Remedy by Mandamus to Move Traffic or Furnish Cars.

— That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement. (*New section added March 2, 1889, being section 10 of chap. 382; approved March 2, 1889.*)

Object and Scope of the New Section.— The purpose of the section added to the Interstate Commerce Act by the act of March 2, 1889, was to give the shipper an additional summary and effective remedy by writ of *mandamus* to compel the carrier to obey the law, and furnish to all shippers equal facilities. The damage and injury done by carriers under the system of secret rebates was the primary cause which induced Congress to pass the Interstate Commerce Act. But the carrier resorted to other means to favor certain shippers at the expense of their rivals, and to enable such shippers thereby to secure a monopoly in certain kinds of traffic. Among the means employed by the carrier was to permit certain shippers to build sidings and switches on the carrier's land which permission it denied to others. The advantage thus secured is obvious. The cost of loading, to a shipper using switches and sidings was greatly reduced, and gave the favored shipper a decided advantage over a competitor who enjoyed none of these facilities. Another method of discrimination was in the allotment of cars. The favored shipper got all the cars he wished. The competitor was occasionally furnished with cars, and was forbidden to furnish his own cars. The cars of the favored shipper were moved promptly on schedule time. The cars of the competitor were moved at the convenience of the carrier. The reported cases reveal this state of affairs principally in the shipping of coal and coke.

The cause of this unjust discrimination was further revealed in the recent case of *Interstate Com. Co. v. Baird*, 194 U. S. 25, in which it was shown that the favored shippers were also officers or directors of the transportation companies. It thus appeared that the carriers in discriminating in favor of certain shippers were discriminating in favor of themselves. The new section was intended to furnish a remedy, as far as practicable, for the sort of discrimination indicated.

The language of the new section requires the carrier not only to furnish cars, but "to move and transport traffic" and furnish cars "or other facilities for transportation." It has been held that this language furnishes a remedy for the discrimination practiced by one carrier against another operating a parallel or competing connecting line, which discrimination is forbidden

in section 3, last paragraph, and in section 7. The provisions of these sections have frequently been successfully evaded.

Mandamus Remedy for Discrimination against Connecting Carrier.— Assuming that a carrier cannot be compelled to make a contract for through rates or joint tariffs on through bills of lading with connecting lines, nevertheless the court has power, by writ of *mandamus*, to compel a carrier (the Wrightsville railroad) to receive and forward freights tendered at its terminus by another carrier (the petitioner, the Augusta Southern), and to prohibit it from charging for such service rates so unreasonable as to prohibit the shipment of interstate freights. A through bill of lading is a facility, but not a necessity, for interchange of rates. *Augusta Railroad v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga.).

Petitioner, the Augusta Southern, claimed that the Wrightsville road discriminated against it in favor of a competing connecting carrier, the Central of Georgia, by charging the petitioner higher rates on through freights than it charged to the Central, its competitor. It alleged that prior to December 24, 1895, the respondent treated both roads alike on through freight, but on that day annulled its contract with petitioner, and charged it higher rates than its competitor for the purpose of injuring the petitioner and diverting its traffic. The court treated the petition as an application for a writ of *mandamus* under section 10 of the Act of March 2, 1889, being the new section 23, added to the act, and held that the local rate charged petitioner, \$2.76 per ton, was unreasonable compared with \$2.40 per ton charged its competitor for like service, and directed the respondent to forward and deliver shipments from the petitioner when it tendered or paid the rate charged its competitor for a like service, and directed it to afford petitioner equal and fair facilities for the interchange of interstate business. *Ib.*

Mandamus — Peremptory Writ — Question of Fact.— The general rule is that a peremptory writ of *mandamus* will not issue if, upon the pleadings, a question of fact remains to be disposed of. This rule has been modified by the act of March 2, 1889.

The statute confers upon the court discretionary power to issue

a peremptory writ “notwithstanding such question of fact is undetermined upon such terms as to security, payment of money into court, or otherwise as the court may think proper.” This provision of the statute becomes operative only when the pleadings disclose a case where the shipper has been unjustly discriminated against by the carrier. Where the facts show that the carrier has refused to move traffic for a shipper at the same rates as are charged, or upon terms or conditions as favorable as are given by the carrier for like traffic under similar conditions to any other shipper” then a *prima facie* case is made out, and a peremptory writ may issue, and the question as to proper compensation may be reserved. But until a *prima facie* case is made, the relator is not entitled to any relief. *United States ex rel. Morris v. Delaware Railroad*, 40 Fed. Rep. 101.

Mandamus — Unjust Discrimination must be Shown.— To entitle a shipper to a writ of *mandamus* to compel the carrier to move interstate traffic, the relator must show that the carrier has discriminated unjustly against the relator and has denied the request to move his traffic “at the same rates as are charged or upon terms or conditions as favorable as those given by said carrier for like traffic upon similar conditions to any other shipper.” *United States ex rel. Morris v. Delaware Railroad*, 40 Fed. Rep. 101.

A petition was filed by one Morris, a shipper of live stock, which set forth that the carrier refused to transport the relator's cattle upon cars of a special construction belonging to the American Live-Stock Transportation Company, which cars relator claimed were superior to ordinary cattle cars by reason of improvements in their construction. Relator claimed that the carrier shipped cattle for others in cars belonging to the Lackawanna Live-Stock Express Company, and that the cars of the latter company had some, but not all, of the improvements of cars of the American company. The court issued an alternative writ. Respondent filed a return to the writ, setting forth a denial of the material averments of the petition, and alleged a contract between respondent and the Lackawanna Live-Stock Company under which the latter agreed to furnish the carrier at least 200 of its improved cars for a period of five years to be run

on respondent's railroad. That the cars so furnished were so constructed as to permit respondent to carry coal in them when not loaded with live stock. That the carriage of coal was the principal business of respondent. That under its contract, by reason of the special advantages in the construction of the cars so furnished, the relator agreed to pay mileage for the use of such cars in the same manner as if the cars were furnished by a connecting company. That after making such agreement, several carriers operating trunk lines agreed to discontinue hauling private stock cars, except for horses, for reasons set forth in the return. The return further alleged that the 200 cars so furnished to the relator were not used exclusively by any one shipper, but were available to all shippers.

The relator demurred to the return as not sufficient in law to justify the carrier in refusing to transport the relator's cattle in cars furnished by the American company. *Ib.*

The court, his honor, Judge WALLACE, sustained the demurrer and denied the writ upon the ground that it appeared by the petition and return that the relator was not discriminated against as matter of law because the carrier had never refused to carry his cattle in the cars furnished by the Lackawanna company, and that those cars, or a *pro rata* share thereof, were always available to the relator for his use. That the facts did not disclose any unjust discrimination toward the relator as to rates because respondent does not refuse to carry traffic for it under substantially similar circumstances and conditions to those of its service for the Lackawanna company, and the carrier gives the latter no unreasonable preference or advantage over the relators. *Ib.*

The court further held that it was unnecessary to decide upon the demurrer whether, as between the two live-stock companies, each ready and willing to furnish cattle cars to the carrier, the carrier would be guilty of unjust discrimination against the American company if it refused to make a contract to use its cars upon the same terms and conditions as it contracted to use the cars furnished by its rival, the Lackawanna Live-Stock Company. *Ib.*

The Interstate Commerce Act changes the common-law rule, and places all shippers on an equality. At common law a carrier

was not obliged to place all shippers and patrons upon an absolute equality. It might charge less than fair compensation to one class of persons, but others could complain only in case the carrier charged the party complaining unreasonable rates. *Menacho v. Ward*, 27 Fed. 530; *Express Cases*, 117 U. S. 1. But the common-law rule in this regard has been modified by the Interstate Commerce Act which requires the carrier to treat all shippers impartially. *Ib.*

Mandamus — Pro-rating Coal Cars.— The gist of a proceeding under the statute (act of March 2, 1889) to compel by *mandamus* a carrier to furnish cars or facilities to move interstate traffic is an unjust discrimination in favor of one shipper over another similarly situated. Congress intended to remedy such a wrong by authorizing the Circuit or District Court of the United States to issue a writ of *mandamus*. There must not only be a discrimination, but there must be an unjust discrimination. *United States v. Norfolk Railway*, 109 Fed. Rep. 831.

In the case cited the court quoted from an opinion of Judge COOLEY (*Rice v. Railroad Co.*, 1 Int. Com. Rep. 503), as expressing the rule of law in this class of cases as follows:

“It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railroad Co. v. Pratt*, 22 Wall. 123), and then to offer their use to everybody impartially. If the varieties of traffic are such, and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot, with any justice, be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic.”

The relator, a shipper of coal from the Indian Ridge mine, complained that he was discriminated against by the railroad in not furnishing the relator sufficient cars to enable it to fill its orders, and that defendant favored Castner, Curran & Bullitt, com-

petitors, in its allotment of cars to them. An alternative writ was issued and evidence was taken. The carrier showed that it had not cars enough to accommodate all shippers, but distributed what it had among all shippers pursuant to a custom in vogue for many years in the Pocahontas coal field. The owners required operators who leased the mines to construct 100 coke ovens to every 500 acres of coal lands leased. Under this agreement the carrier was, by custom, bound to furnish one and one-half cars to each coke oven, and, in fact, furnished nearly two cars for each coke oven, and this was done among all shippers except upon arbitraries explained in the testimony as *pro rating* between localities on the east and west of Great Flat Top mountain. The court, upon the evidence, held that the relator failed to show unjust discrimination, and denied the writ. *United States v. Norfolk Railroad*, 109 Fed. Rep. 831.

Further held that the custom had been open and notorious for years, and under it no secret discrimination could be practiced. *Ib.*

Held further, that the offer of relator to furnish the carrier with cars to be used exclusively by the relator, the railroad to acquire the ownership of the cars by paying for them on instalments, did not alter the carrier's obligations to the public. Because if the carrier owned the cars or sought to acquire them, their use in favor of one shipper would operate as a discrimination against other shippers. If the carrier owned the cars it was bound to allow all shippers to participate in their use. *Ib.*

Mandamus — Amendment of Writ.— An alternative writ of *mandamus* may be amended after issue joined, and a peremptory writ may be issued to conform to the proof and findings. The petition for the writ prayed that relator, the Kingwood Coal Company, be decreed to be entitled to 33 $\frac{1}{3}$ per cent. of the total car supply furnished by the carrier to coal mines along its line. *Held*, that the allegation and prayer of the petition might be amended so as to conform to the facts, after which a peremptory writ could issue requiring the defendant carrier to cease giving a preference to two competing shippers and to furnish the relator, without discrimination and upon conditions as favorable as those given to other shippers, the full supply of cars due to it under

existing conditions amounting in tonnage thereof to at least 31 per cent. of present distribution. *United States ex rel. Kingwood Coal Co. v. West Virginia Railroad*, 125 Fed. Rep. 252.

Railroads have power by improper distribution of cars among competitors to build up the business of some shippers at the expense of others. It can ruin and drive out of business those shippers against whom it may choose to discriminate. To prevent such injustice, the Interstate Commerce Act was passed. The object and purpose of the act was to compel the carrier to treat all shippers alike, and to place every shipper upon an equality. The remedy afforded by the statute permits the shipper to invoke the summary remedy afforded by a writ of *mandamus* to compel the carrier to move traffic and furnish cars and proper facilities. *Ib.*

Mandamus — Basis of Car Allotments.— The relator was a miner and shipper of coal in Preston county, W. Va., on the line of the respondent's railroad, the Virginia and Northwestern. It joined as respondents two competitors, to-wit, the Irona Coal and Coke Co. and the Atlantic Coal and Coke Co., miners and shippers on the same road; the three collieries being the only ones operated along the line of relator's railway. Relator claimed that the carrier discriminated against it in favor of its rivals, the Irona and Atlantic companies. The cars were furnished to respondent carrier by the Baltimore and Ohio railroad, over whose line the coal ultimately reached the market. The inequality alleged was that the carrier furnished and distributed its cars as follows: To the relator, 17 per cent.; to the Irona Co., 27 per cent.; to the Atlantic Co., 56 per cent. The allotment was based on the following ratings, capacity, or *per diem* output of the respective mines: 400 tons to the relator, 600 tons to the Atlantic, and 1,250 tons to the Irona. *Held*, that in reaching a proper basis for the distribution an impartial and intelligent study of the capacity of the mines is necessary. This should be done by competent and disinterested experts charged with the duty to carefully examine the different elements that are essential factors in finding the daily output of the respective mines which are to share in the allotment, to-wit: (1) the working places; (2) number of mine cars, and their capacity;

(3) switch and tipple efficiency; (4) number and character of mining machines; (5) hauling system and power used; (6) number of employees; (7) the number of mine openings, and (8) miners' houses. None of these elements are absolutely controlling, the most important being the real working places and available points at which coal can profitably be mined. *United States ex rel. Kingwood Coal Co. v. West Virginia Railroad*, 125 Fed. Rep. 252.

Right of Shipper to Designate Route.— A shipper has a right to designate over what route he will ship his products, where there are a number of competing connecting lines, beyond the initial point or point of origin of the shipment. An attempt by the carrier to deny this right to the shipper may be enforced by injunction. Perhaps *mandamus* would also afford a summary remedy.

The question as to the shipper's right to designate the route of shipment arose in California at the suit of shippers of oranges, lemons, and other citrous fruits engaged in shipping from points in California to points east of the Missouri river. The defendant carriers, the Southern Pacific, and the Atchison, Topeka and Santa Fe companies, promulgated a rule whereby shippers of fruit from California to eastern cities were forbidden the right to designate over what route their property should be transported, when such shipments were made over defendant's lines at the initial point. Under this rule the carriers assumed the right to arbitrarily bill the merchandise over the joint or continuous lines or routes established by the initial carriers, between points of shipment and through points of destination. The shipper was obliged under the carrier's rule to contract for a through rate at the published rate or charge applying over such continuous route or line. Defendants also refused to keep open to the public their published tariff rates on oranges, lemons, and citrous fruits between points of shipment and destination, when such rates were lawfully in force over each route or line published in their joint schedule of tariff.

These facts were shown to the Interstate Commerce Commission and after full hearing the Commission made an order di-

recting the carriers to cease and desist from maintaining or enforcing the rule complained of whereby the shipper was denied access to the published tariff rates over all connecting lines, and was denied the right to designate the route of shipment beyond the point of origin. The carriers refused to obey the order. The Commission then brought suit to enforce the order in the United States Circuit Court, southern district of California, and in its petition prayed for an injunction perpetual to restrain defendants from doing the acts complained of. The carriers demurred to the petition. The court overruled the demurrers and directed defendants to answer.

The court held that a rule reserving to the defendants, as initial carriers, the unqualified right of routing beyond its own terminal all shipments made under an established joint through rate could be tested in a suit in which the connecting carriers who joined in making the rate were not parties. Such connecting carriers while proper parties to the suit were not essentially necessary parties. *Interstate Com. Co. v. Southern Pacific*, 123 Fed. Rep. 597. (June, 1903, Circ. Ct. So. Dist. Cal.)

Held further, that a finding by the Commission that the purpose and effect of the rule complained of by which defendants as initial carriers reserved the right to route through shipments beyond their own lines was to assist in carrying into effect a pooling agreement between their connecting carriers in violation of section 5 of the Commerce Act is pertinent to the inquiry, and supports the legality of the order of the Commission. *Ib.*

Held further, that the question as to whether the rule complained of subjected shippers to undue, unjust, and unreasonable prejudice and disadvantage, and gave to the initial carriers an undue and unreasonable preference, was a question of fact, and an order based on findings to support it was *prima facie* a lawful order, and one which the court is required to enforce under section 16 of the act. *Ib.*

CHAPTER III.

THE SHERMAN ACT.

Entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." Approved July 2, 1890. Also Anti-Trust Provisions of Wilson Bill, in Effect August 27, 1894.

ANALYSIS OF STATUTES.

THE SHERMAN ACT.

- SEC. 1. Trusts and monopolies unlawful — Misdemeanor to contract.
2. Misdemeanor to combine.
 3. Contract in restraint of trade illegal — Penalty.
 4. Remedy injunction — Jurisdiction of Federal court.
 5. Additional parties may be brought in.
 6. Trust property, when confiscated.
 7. Suits by injured parties — Treble damages.
 8. Persons defined; to include corporations.
 73. Wilson Bill — Trusts and monopolies by importers.
 74. Wilson Bill — Remedy injunction — Jurisdiction of Federal courts.
 75. Wilson Bill — Additional parties may be brought in.
 76. Wilson Bill — Trust property, when confiscated.
 77. Wilson Bill — Suit by injured parties — Treble damages.
 34. Dingley Bill does not repeal anti-trust features of Wilson Bill, contained in the foregoing sections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

§ 1. **Trusts and Monopolies Unlawful.**— Every contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. [*Misdemeanor to Contract.*] Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Sherman Act.— The act of July 2, 1890, is practically a supplement to the provisions of the Interstate Commerce Act. The latter applies only to common carriers. Its primary object was to place all shippers upon an equality and to declare illegal all discrimination among shippers, and to make it a crime for any common carrier to give a rebate, or unjust preference, or advantage to one shipper, whereby he would be able to undersell his competitors, destroy competition, and monopolize a particular branch of trade or commerce. It was intended also to prohibit parallel or competing lines of railroad from forming a pool, association, or trust to destroy competition and place the community at the mercy of carriers controlled as a unit. In other words pooling was forbidden because the result of such a combination, it was claimed, would place the shipper and consumer under the control of the carrier.

The result of the rebate system practiced by the carriers of the country in direct violation of the Commerce Act enabled certain shippers to destroy competition in certain branches of trade. The evidence in some cases showed that these favored shippers were officers of the carrying companies who gave the rebates that enabled the beneficiary of the carrier's bounty to destroy competition. In so doing the carrier was practically shipper as well as carrier. In giving rebates to favored shippers the carriers were in effect giving the rebates to themselves. Equality of opportunity was denied. The merchant or manufacturer who was not favored could not build his own railroad and was obliged

either to be absorbed by the trust, at whatever price the trust saw fit to allow, or to go out of business.

Under these conditions powerful industrial combinations were formed to control the production and sale of commodities, including the necessities of life. These combinations are popularly termed trusts. In brief a trust combines the control or power to control several rival competing businesses to the end that competition among them may be suppressed. The market is made daily by a committee of the trust, appointed for that purpose and the price to the consumer is no longer regulated by fair and legitimate competition which exists only when trade and commerce is allowed to operate free, unobstructed, and unrestrained. The market price is made by the committee of the trust. The consumer must pay, and has no redress, and no remedy.

This condition of affairs became onerous and oppressive. Redress was sought by legislation, making such combinations illegal, and those engaged in them guilty of crime. The Sherman Act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies" was the result. The act is universal in its application and embraces *all* contracts and *every* contract in restraint of trade, whether made by carriers, manufacturers, producers, or shippers. A railroad corporation, while governed by the provisions of the Interstate Commerce Act, is also governed by the provisions of the Sherman Act. Both acts must stand, the Supreme Court has declared. They are not hostile and conflicting. The object of both is to reach the same evil, and both statutes must be so construed.

Constitutionality of the Sherman Act.—The validity and constitutionality of the Sherman Act has never been seriously questioned. The point was raised in the *Joint Traffic Association* case, 171 U. S. 505, but the Supreme Court held the act valid. The court declared that the act was clearly within the power conferred by the Constitution upon Congress to "regulate commerce." The laws enacted in the legitimate exercise of this power are supreme. "Anything in the Constitution or laws of any State to the contrary notwithstanding." "An act of Congress," says Mr. Justice HARLAN in the *Merger* case, *infra*

(March, 1904), a case arising under the Sherman Act, "constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohen v. Virginia*, 6 Wheat. 264. These views have been often expressed by this court."

Summary of Authority under Sherman Act.—Prior to the 14th day of March, 1904, the Supreme Court of the United States had decided a number of cases (seven in all) directly under the Sherman Act, construing the scope of the act and the meaning of its provisions. The *Merger* case (*Northern Securities Co. v. United States*, 193 U. S. 197), decided March 14, 1904, was perhaps the most important deliverance of the court, since the famous decision of Chief Justice MARSHALL, in *Gibbons v. Ogden* (9 Wheat. 197). Mr. Justice HARLAN took occasion to summarize all previous decisions under the statute, and state what he conceived to be the rules of law established by them. This summary is as follows:

"The first case in this court arising under the Anti-Trust Act was *United States v. E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290. That was followed by *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *Addyston Pipe Co. v. United States*, 175 U. S. 211, and *Montague v. Lowry*, 193 U. S. 35. To these may be added *Pearsall v. Great Northern Railroad*, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States v. Knight*, it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced in-

terstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States v. Trans-Missouri Freight Assn.*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States v. Joint Traffic Assn.*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins v. United States and Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addystone Pipe Co. v. United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided; and in *Montague v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates, and mantels, in different States, whereby they controlled, or sought to control, the price of such articles in those States, was condemned by the act of Congress. In *Pearsall v. Great Northern R. Co.*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: 'The consolidation of these two great corporations will unavoidably result in giving to the defendant (the Great Northern) a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public — that their best security is in competition.'

Legal Propositions Deducible from Former Decisions.—
Mr. Justice HARLAN in his opinion in the *Merger* case, after having briefly summarized the prior cases decided in the court

as above, proceeds to state the legal propositions deducible from them as follows:

“It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

“That although the act of Congress, known as the Anti-Trust Act, has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in *restraint* of trade or commerce *among the several States or with foreign nations*;

“That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

“That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

“That combinations, even among private manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

“That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

“That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain such trade or commerce, is made illegal by the act;

“That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

“That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international

trade or commerce or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition;

“That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

“That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

“No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties.”

The Sugar Trust Case.—The first case under the Sherman Act, *United States v. Knight Co.*, 156 U. S. 1, known as the Sugar Trust case, reached the Supreme Court in the fall of 1894. It was argued October 24, 1894, and was decided January 21, 1895.

On behalf of the United States as complainant, a bill was filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the E. C. Knight Company, the American Sugar Refining Company, the Spreckels Sugar Refinery, the Franklin Sugar Company and the Delaware Sugar House, praying for an injunction to restrain defendants from continuing alleged violations of the Sherman Act, and for the cancellation of the agreements and re-delivery of the stock and for other relief. The bill alleged in substance that the four defendants, the Knight Company (a Pennsylvania corporation), the Franklin Sugar Company (a Pennsylvania corporation), the Spreckels Company (a Pennsylvania corporation), and the Delaware Sugar House (a Pennsylvania corporation), until about March 4, 1892, were independently engaged in the manufacture and sale of sugar and sold their products in the several States of the United States, and were all engaged in trade or commerce with the several States and with foreign nations, and manufactured about

33 per cent. of the sugar refined in the United States, and were competitors of defendant, the American Sugar Refining Company. That prior to March 4, 1894, the four defendants above named and defendant, the American Sugar Refining Company, controlled all the sugar refineries in the United States, except that controlled by the Revere Company of Boston, which latter produced annually about 2 per cent. of the total amount of sugar refined in the United States. That prior to March 4, 1892, 98 per cent. of all the sugar produced in the United States was manufactured by the five defendants above named.

The bill then alleged that the defendant, the American Sugar Refining Company, in order to obtain control of the production of sugar in the United States, and to control the price of that commodity, acting through John E. Searles, Jr., entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four defendant companies, and that they had entered into contracts with said companies for the purchase of all the stock of the four companies, in exchange for shares of the defendant the American Sugar Refining Company, in order to restrain trade and commerce in refined sugar among the several States, and to increase the price at which refined sugar was sold, and that said agreements and contracts were illegal, and were in restraint of trade and commerce and were in violation of the provisions of the Sherman Act. Answers were filed and proof taken. The facts were proved substantially as alleged with regard to the purchase and sale of the stock, and the amount of sugar produced, but defendants claimed the combination was effected for economy, that the price had been slightly advanced, but was still lower than it had been for some years before.

The Circuit Court dismissed the bill on the ground that the proof did not show a contract or conspiracy to restrain or monopolize trade or commerce among the several States or with foreign nations (60 Fed. Rep. 306). This decree was affirmed in the United States Circuit Court of Appeals (March, 1894), 60 Fed. Rep. 934. On appeal to the Supreme Court of the United States the decree of the Circuit Court of Appeals was affirmed (January, 1895).

Chief Justice FULLER, in the course of his opinion, observes: "It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations, but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfer; yet the act of Congress only authorizes the Circuit Courts to proceed by way of preventive and restraining violations of, the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce." *United States v. Knight Co.*, 156 U. S. 1.

Dissenting Opinion of Justice Harlan.— The questions involved and discussed under the Federal statutes with respect to trade and commerce present, primarily, questions of law. In a larger sense they involve questions of economics and political science. The questions affect directly the welfare and happiness of the community or the consumer because they relate to the price which must be paid by the consumer for necessities of life and staple articles of commerce. The dissenting opinion of Justice HARLAN in the *Knight* case was based on the assumption that the case involved more than the purchase of the

stock of a manufacturing corporation. That it involved also the sale and transportation to other States of specific articles of commerce. In the *Addystone Pipe* case (175 U. S. 211), decided in December, 1899, every member of the court concurring, indorsed the reasoning of Justice HARLAN in his dissenting opinion in the *Sugar Trust* case, because in the *Addystone Pipe* case, there was proof that the combine was engaged in disposing of their manufactured goods in diverse States; and that such proof, the majority of the court held, was lacking in the *Knight* case. Mr. Justice PECKHAM, writing the decision in the *Addystone Pipe* case, which was unanimous, observes in this connection:

“The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State was held to be immaterial, and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of congress because such a contract, or combination, did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce.” (Opinion of PECKHAM, J., 175 U. S. at page 240.)

In support of his views in the *Knight* case, *supra*, Justice HARLAN said in part:

“Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey, for the purpose of buying, manufacturing, refining, and selling sugar in different parts of the country, had

obtained the control of *all* the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations — the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House — and the other, by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about 33 per cent., and that of the Boston company about 2 per cent., of the entire quantity of sugar refined in the United States.

"In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation — using for that purpose its own stock — purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small an amount to be regarded in this discussion.

"The object," the court below said, 'in purchasing the Philadelphia refineries was to obtain a greater influence or *more perfect control over the business* of refining and selling sugar in this country.' This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not, therefore, analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the National Government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

* * * * *

"It would seem to be indisputable that no *combination* of corporations or individuals can, *of right*, impose unlawful restraints upon *interstate* trade, whether upon transportation or upon such interstate intercourse and traffic as precede transportation, any more than it can, *of right*, impose unreasonable restraints upon the completely internal traffic of a State. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corpora-

tions or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

* * * * *

“In my judgment, the citizens of the several States composing the Union are entitled, of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot co-exist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all **recognized articles of commerce**, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

“Undue restrictions or burdens upon the purchasing of goods, in market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *State* within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar *to be transported to other States*, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the National Government from putting unlawful restraints upon the purchasing of that article *to be carried from the State in which such purchases are made*? If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent

unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may — so far as national power and interstate commerce are concerned — do, with impunity, what no State can do.

* * * * *

“In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forebore to impose any limitations upon the exercise of that power to except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief Justice MARSHALL three-quarters of a century ago, and which has been repeatedly affirmed by this court.

* * * * *

“While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles — especially the necessities of life — that go into commerce among the States. The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving as it does that freedom

of commercial intercourse among the States which the Constitution sought to attain.

"It is said that there are no proofs in the record which indicate an *intention* upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted, in words, that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object is disclosed upon the very face of the transactions described in the bill. And it is provided — indeed, is conceded — that that object has been accomplished to the extent that the American Sugar Refining Company now controls 98 per cent. of all the sugar refining business in the country, and, therefore, controls the price of that article everywhere. Now, the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law — there being no adjudged case to the contrary in this country — a direct restraint of trade in the articles for the control of sales of which in this country that combination was organized. And that restraint is felt in all the States, for the reason known to all, that the article in question goes, was intended to go, and must always go, into commerce among the several States, and into the homes of people in every condition of life.

"A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations or corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes

none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness — so powerful that no single State is able to overthrow them and give the required protection to the whole country, and so all pervading that they threaten the integrity of our institutions.

“We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all refined sugar in this country. Suppose another combination, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power — one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

“To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. ‘Powerful and ingenious minds,’ this court has said, ‘taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the State are retained if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived.’ *Gibbons v. Ogden*, 9 Wheat. 1, 222.

“While a decree annulling the contracts under which the combination in question was formed may not, in view of the facts disclosed, be effectual to accomplish the object of the act

of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the States against combinations and conspiracies which impose unlawful restraints upon such intercourse.

“For the reasons stated I dissent from the opinion and judgment of the court.”

Railroad Trust Cases.— The next case decided in the Supreme Court involving the Sherman Act was *United States v. Trans-Missouri Freight Assoc.* (argued December, 1896; decided, March 22, 1897). The controversy arose upon a bill filed January 6, 1892, on behalf of the United States in the Circuit Court of the United States for the district of Kansas, first division, to dissolve a voluntary association described in the bill as the “Trans-Missouri Freight Association” against that association, the Atchison, Topeka & Santa Fe railroad and seventeen other railroad companies, praying for the dissolution of the association or combination on the ground that it was a combination in restraint of trade and commerce, in violation of the Sherman Act, and for an injunction to restrain defendant companies from carrying into effect the agreement under which the association was formed. The bill set forth the compact or agreement entered into by defendant carriers and the articles of the association, which it was averred was entered into to pool the issues of the carriers and punish all infractions of the agreement by any defendant company, to destroy competition among the competing carriers, and increase freight rates, and to monopolize the freight traffic between the States and Territories of the United States. The answers practically admitted the facts alleged in the bill, but denied that there was any intent to monopolize traffic, or raise freight rates, or restrain commerce. Defendants alleged their purpose was to maintain only just and reasonable rates, and that the agreement had been duly filed pursuant to section 6 of the Commerce Act. The Circuit Court

dismissed the bill November, 1892 (53 Fed. Rep. 440), on the ground that the agreement was not in restraint of trade, and that carriers were not embraced within the provisions of the Sherman Act. In October, 1893, the Circuit Court of Appeals affirmed the decree, and an appeal was taken to the Supreme Court of the United States, which reversed the lower courts (Justices WHITE, FIELD, GRAY, and SHIRAS dissenting) March 22, 1897, on the ground that railroad companies, carrying and transportation corporations were within the provisions of the Sherman Act, and agreements made by them, if in restraint of trade and commerce were illegal and void. Mr. Justice PECKHAM, Chief Justice FULLER, and Justices HARLAN, BREWER, and BROWN concurring, held that the agreement set forth in the bill was illegal and void, and that the Circuit Court should have sustained the bill and granted the relief prayed for.

After an elaborate discussion of the law Mr. Justice PECKHAM observed: "In the view we have taken of the question, the intent alleged by the government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. * * * The agreement while in force and assuming to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade and commerce as described in the act.

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce no matter what the intent was upon the part of those who signed it."

The court further held that the United States could maintain the suit, by virtue of the fourth section of the Sherman Act, and the fact that it has no pecuniary interest in the result, or in the question to be decided was not material, and that Congress had power to create a remedy by injunction as more efficient than any other civil remedy. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

For a further report of this case see under section 5 of the Interstate Commerce Act, page 122, *ante*.

Railroad Trust Cases, Continued.— The carrying companies attempted, indirectly, to secure a reversal of the *Trans-Missouri* case. While it was still pending thirty-one railroads entered into an association, governed by a constitution and by-laws, known as the Joint Traffic Association, agreement to take effect January 1, 1896, and to continue in force for five years. The provisions of this agreement were substantially similar to that involved in the *Trans-Missouri* case. The joint-traffic agreement, however, contained an express clause that the powers conferred upon the managers of the association should be so construed and exercised *so as not to permit any violation of the Interstate Commerce Act*. Yet the agreement gave the association jurisdiction and control of the transportation business and competitive traffic between Chicago and the Atlantic coast, with power to fix rates, fares, and charges and change the same from time to time. All parties violating the rules of the association were to be disciplined, fined, and punished. *United States v. Joint Traffic Assn.* (October, 1898), 171 U. S. 505.

A bill was filed on behalf of the United States to dissolve the association and enjoin the members from carrying out the agreement. The pleadings were similar to those in the *Trans-Missouri* case. The bill was dismissed in the Circuit Court, and on appeal the decree was affirmed in the Circuit Court of Appeals. On appeal to the Supreme Court of the United States, October 24, 1898, the decrees of the lower courts were reversed. The court, Mr. Justice PECKHAM, with whom Chief Justice FULLER and Justices HARLAN, BREWER, and BROWN concurred, *held* that the case could not be distinguished from the *Trans-Missouri* case. Counsel in the *Joint Traffic Association* case urged for the first time that the Sherman Act was unconstitutional, and impinged upon the rights of property which it was claimed were vested in the carrying corporations. On this point Mr. Justice PECKHAM observed:

“The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires

them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them, by means of which competition is to be smothered." *United States v. Joint Traffic Assn.* (October, 1898), 171 U. S. 505.

For further reference to above case see under section 5 of the Interstate Commerce Act, *ante*, page 122.

Cattle Trust Cases.—The next case which reached the Supreme Court of the United States, in order of time, was that of *Hopkins v. The United States*, which was brought in behalf of the government in the Circuit Court of the United States, district of Kansas, first division, to enjoin the cattle trust, an unincorporated association, a constituent of the beef trust, known as the Kansas City Live Stock Exchange, and its members, defendant Henry Hopkins and others, upon the ground that defendants were engaged in an illegal combination to restrain trade and commerce in the business of buying and selling, receiving, and handling as commission merchants live stock received in the stockyards at Kansas City, Kan., and Kansas City, Mo., and sold for shipment to various States and Territories. The bill set forth the rules and regulations of association, with appropriate allegations, bringing defendants within the provisions of the Sherman Act. Upon the answers of defendants the Circuit Court sustained the bill and granted the injunction as prayed for (82 Fed. Rep. 529). On appeal certain questions were certified by the Circuit Court of Appeals to the Supreme Court of the United States, and the latter directed that the entire record be brought before it on a writ of *certiorari*. The Supreme Court reversed the Circuit Court and remitted the case with directions to dismiss the bill with costs. *Hopkins v. The United States* (October, 1898), 171 U. S. 578.

The Supreme Court based its decision in the above case, and also in the case of *Anderson v. The United States* (171 U. S. 604), upon the ground that the business of receiving consignments of live stock from owners in various States, feeding them and disposing of them in the market, and paying the proceeds to the owners after deducting charges, expenses, and advances, was not interstate commerce within the meaning of the Sherman Act.

The Kansas City Live Stock Exchange operated and maintained stockyards both at Kansas City, Kan., and Kansas City, Mo., and furnished facilities for keeping and feeding live stock sent to its members from various States and disposing of the stock in the open market. The association adopted a constitution and by-laws containing certain conditions, restrictions, and limitations as to the mode of conducting its business. Among these was a rule that no member of the association should purchase live stock from any commission merchant in Kansas City not a member of the association; also fixing a minimum rate of commissions on sales of live stock; forbidding the employment of agents to solicit consignments, except such as should be employed at a stipulated salary; prohibiting the sending of prepaid messages by telegraph or telephone, giving information as to the condition of the market, but permitting quotation of actual sales on the date made. *Ib.*

The court held that the Sherman Act embraced only contracts and agreements affecting interstate commerce, and that the agreements complained of did not immediately and directly affect such commerce within the provisions of the Act. That while the indirect effect of the agreements might enhance the cost of marketing cattle, yet the agreements themselves would not necessarily, for that reason, be in restraint of interstate trade or commerce. Their effect is either indirect, or relate to charges for the use of facilities furnished. Such agreements would be valid provided the charges agreed upon were reasonable, even though such charges might enhance the cost of doing business. Citing *Packet Co. v. St. Louis*, 100 U. S. 423; *Packet Co. v. Cattlesburg*, 105 U. S. 559; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Huse v. Glover*, 119 U. S. 543; *Ouachita*

Packet Co. v. Aiken, 121 U. S. 444; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92. *Ib.*

The court held further that the agreements did not affect the right of cattle-owners to sell and dispose of their stock, and the remedy for exorbitant charges was one of local law. The fact that the yards of the association were partly in Kansas and partly in Missouri did not make the business of the association upon the facts in the case interstate commerce. *Ib.*

The ruling in the *Hopkins* case was also applied in a similar suit by the United States against members of the Traders' Live Stock Exchange, an unincorporated association similar in character to the Kansas Live Stock Exchange, doing business principally in Kansas City, Mo. *Anderson v. United States*, 171 U. S. 604.

Iron Pipe Trust.—The case entitled *Addystone Pipe Co. v. United States*, 175 U. S. 211, was begun in January, 1897, and decided in the Supreme Court December 4, 1899. The suit was begun by the United States District Attorney in the eastern district of Tennessee at the instance of the Attorney-General in behalf of the United States against six corporations engaged in the manufacture of cast-iron pipe, said to be subsidiary corporations of the Standard Oil Trust, charging defendants with having combined and conspired to unlawfully restrain interstate commerce in the sale of such pipe in violation of the provisions of the Sherman Act. The petition prayed that all pipe sold and transported from one State to another, under the combination and conspiracy described, be seized and confiscated as provided by law, and for a decree dissolving the unlawful conspiracy, and for an injunction perpetual, to restrain defendants from operating under the combination.

The petition alleged that defendants were practically the only manufacturers of cast-iron pipe within a territory embracing thirty-six States and Territories, and that in order to create a monopoly of trade within the territory they entered into a contract or association known as the Associated Pipe Works, in order to destroy competition and force the public to pay unreasonable prices. That each defendant in the association selected its representative, and these representatives constituted the execu-

tive committee of the trust. It is the duty of this committee to fix the price to bid for pipe to be furnished for any public work for which bids were advertised. That it was agreed that members of the association should not compete with each other, and it was further agreed that a bonus should be charged on all work done and pipe furnished, and this bonus was added to the market price of pipe sold. The amount of the bonus was from \$3 to \$9 per ton. That on all bids for public work the committee decided to whom the bid should be awarded, to be determined by the highest bonus which any company, as between themselves, was willing to pay. The company assigned puts in its bid to the city or company advertising for pipe, and the committee arranges to "protect" the bid by directing that all other bids shall be slightly in advance of the protected bid.

The association parcels out its dominions by declaring all territory embraced in the thirty-six States and Territories which constituted its immediate field, being mainly western and southern States, as "pay territory." All outside of this is designated "free territory." Within the "pay territory" were designated certain "reserved cities" in which only particular members of the association shall have the work in consideration of fixed bonuses to be paid into the trust. The "pay cities" are parceled out under the rules of the association to the members.

Bonuses in "Pay Territory" and "Reserved Cities."—The minutes of the Associated Pipe Works, representing all constituent members of the combination, divided among them its "pay territory" and fixed its bonuses therein as follows:

	Bonus.		Bonus.
Alabama	\$3 00	Tennessee, east of Cleve-	
Birmingham, Ala.	2 00	land	\$2 00
Anniston, Ala.	2 00	Tennessee, middle and	
Mobile, Ala.	1 00	west	3 00
Arizona	3 00	Illinois, except Madison	
California	1 00	and East St. Louis..	2 00
Colorado	2 00	Wyoming	4 00
Indian Territory	3 00	Oregon	1 00
North Carolina	1 00	Ohio	1 50

	Bonus.		Bonus.
North Dakota	\$2 00	West Virginia	\$1 00
South Dakota	2 00	Kansas	2 00
Florida ..	1 00	Kentucky	2 00
Georgia ..	2 00	Louisiana	3 00
Atlanta, Ga.....	2 00	Mississippi	4 00
Georgia coast points...	1 00	Missouri	2 00
Idaho	2 00	Montana	3 00
Nevada	3 00	Nebraska	3 00
Oklahoma	3 00	New Mexico	3 00
Wisconsin	2 00	South Carolina	1 00
Texas interior	3 00	Minnesota	2 00
Texas coast	1 00	Utah	4 00
Washington Territory..	1 00	Indiana	2 00
Michigan	1 50	Iowa	2 00

All other territory free.

Defendants demurred jointly and severally to the bill in so far as it prayed for confiscation of goods *in transit* on the ground that the Sherman Act can afford no such relief in a suit in equity. Defendants also filed answers admitting existence of the association, but alleging its purpose was for economy and to avoid "ruinous competition." Denied the association was in restraint of trade, or was intended to create a monopoly. Testimony was in form of affidavits. On February 5, 1897, after hearing the court dismissed the bill. (78 Fed. Rep. 712.)

Pay Territory — How Allotted — Bonuses — How Divided.— The evidence in the *Addystone Pipe* case showed how the pay territory was allotted or parceled out to the members of the association, and the mode in which the bonuses should be divided. The States and Territories embraced within the domain included Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin.

The mode or plan whereby territory was allotted and profits divided was shown by the minutes of the association offered in evidence as follows:

Division of bonuses.— “First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16” and smaller, shall be divided equally among six shops. Second. The bonuses on the next 75,000 tons, 30” and smaller sizes, to be divided among five shops, South Pittsburg not participating. Third. The bonuses on the next 40,000 tons, 36” and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating. Fourth. The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg, and Anniston not participating.

Bonuses from excess of shipments.— The above division is based on the following tonnage of capacity: South Pittsburg, 15,000 tons; Anniston, 30,000 tons; Chattanooga, 40,000 tons; Bessemer, 45,000 tons; Louisville, 45,000 tons; Cincinnati, 45,000 tons. When the 220,000 tons have been made and shipped, and the bonuses divided as hereinafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addystone Pipe & Steel Company, Dennis Long & Co., and the Howard-Harrison Company.”

Five votes control.— On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

Territory apportioned.— Third. The Addystone Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate. Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water-works in above-named cities. Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta,

Ga., furnishing all pipe for gas and water companies in above-named cities. Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above-named cities. Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo. Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them. Thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make."

"NOTE.— It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them."

Auditor, duties of.— The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the first and sixteenth of each month, he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same, and debit, credit, balance of each company."

The system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following:

Rule to advance prices.—"Whereas, the system now in operation in this association of having a fixed bonus on the several States has not, in its operation, resulted *in the advancement in the prices of pipe*, as was anticipated, except in reserved cities, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish

this purpose it is proposed that the six competitive shops have a representative board located at some central city, to whom all inquiries for pipe shall be referred, and said board *shall fix the price* at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops." In pursuance of the new plan, it was further agreed "That all parties to this association, having quotations out, shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st *bonuses shall be fixed by the committee.*"

"At the meeting of December 19, 1895, it was moved and carried that, upon all inquiries for prices from 'reserved cities' for pipe required during the year of 1896, *prices and bonuses* should be fixed at a regular or called meeting of the principals. At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into 'pay' territory rather than the totals shipped into 'pay' and 'free' territory."

The United States Circuit Court of Appeals on February 8, 1898, reversed the Circuit Court, in an elaborate opinion by Mr. Justice TAFT, with instructions to enter a decree for the United States, perpetually enjoining defendants from maintaining the combination and from doing any business thereunder. On December 4, 1899, a unanimous opinion was rendered in the Supreme Court of the United States, Mr. Justice PECKHAM writing, sustaining the position of Judge TAFT in the Court of Appeals, except only as to goods sold by the corporation within the borders of its own State. *Addyston Pipe Co. v. United States*, 175 U. S. 211.

It was urged on behalf of the defendants that assuming that the contracts and agreements complained of did restrain interstate commerce, yet Congress had no power under the commerce clause to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to, or regulation of, that commerce. The argument was founded on the assumption that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating State legislation, and that this power could not be exercised so as to interfere with private contracts.

Mr. Justice PECKHAM disposed of this contention in a masterly opinion, in the course of which he observes:

"The provision in the Constitution does not, as we believe, exclude Congress from legislating in regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally regulate to a greater or less degree commerce among the States. * * *

"If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them. The private contracts may, in truth, be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character." *Addyston Pipe Co. v. United States*, 175 U. S. 211.

The court held further that the question of intent was not material. If the necessary direct and immediate effect of such contracts be to violate the act of Congress, and also to restrain and regulate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. The design is immaterial. The important element is the fact of the existence of the contract of a direct and substantial regulation of interstate commerce. *Ib.*

Tile Trust.— The case of *Montague v. Lowry*, 193 U. S. 35, was brought by a private citizen against a combination engaged in the manufacture of tiles, grates, and mantels to recover treble damages under section 7 of the Sherman Act. Plaintiffs in that case claimed that they had been boycotted by the trust and were unable to purchase goods except from members of the combine at "list prices," which was 50 per cent. higher than was charged to members of the combine. The case is fully reported under section 7, page 299, *post*.

Merger Case — Combination of Carriers Illegal.— The case of the *United States v. The Northern Securities Co.* was brought to restrain and invalidate an agreement or combination having for its object the consolidation or merger of two carriers, corporations engaged in interstate commerce operating competing lines of transcontinental railway between the Great Lakes and the Pacific ocean, and to dissolve the combination as in violation of the provisions of the Sherman Act.

The suit was begun by the Attorney-General of the United States on behalf of the government under the "Expedition Act" of February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the circuit where the suit is brought when the Attorney-General files with the clerk of the court wherein the case was pending a certificate that it is one of "general public importance." The certificate was filed, and in accordance with the statute the case was "given precedence over others, and in every way expedited."

The suit was tried in United States Circuit Court, district of Minnesota, third division, before Judges CALDWELL, SANBORN, THAYER, and VAN DEVANTER, and resulted in a decree rendered April 9, 1903, all the judges concurring, in favor of the United States for the relief prayed for, declaring the combination complained of illegal and void. (120 Fed. Rep. 721.) Defendants appealed directly to the Supreme Court under the act of February 11, 1903. The case was there reached and argued December 14th and 15th of the same year. It was decided March 14, 1904. From the time of the rendition of the original decree below till the cause was argued in the Supreme Court, the total time consumed under the "Expedition Act" of February 11, 1903, was eight months and five days.

The point decided in the *Merger* case was that a contract or agreement whereby a holding corporation was created, to which the stockholders of two competing parallel lines, contrary to the constitution and laws of the States, creating such competing companies, agreed to transfer the stock of both roads and turn it over to the holding company, creates a trust prohibited by the Federal statute. Such a contract is an agreement or conspiracy among stockholders of competing lines which restrains

interstate commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them, and is unlawful and in direct violation of the provisions of the Sherman Act.

In such a transaction the purchase of the stock of the companies is a mere incident. Such purchase is simply a means to accomplish an unlawful purpose, to-wit, to destroy competition between carriers and create a monopoly of the traffic. *Northern Securities Company v. United States*, 193 U. S. 197.

Merger Case Considered.— In the bill filed by the Attorney-General in behalf of the United States in the *Merger* case, the defendants were the Northern Securities Company, a New Jersey corporation, a holding company, the Great Northern Railway Co., a Minnesota corporation, the Northern Pacific Railway Co., a Wisconsin corporation, and a number of individuals who were controlling stockholders of the defendant companies. It set forth the agreement resulting from the creation of the holding company, whereby the stockholders of the competing lines of railroad operated by defendant carrying corporations, agreed to transfer the stock of both carrying companies to the holding company, which was not engaged in operating any railroad or carrying on interstate commerce, and alleged that the object of the transaction was to restrain trade and commerce among the States by destroying competition between the carrying companies and to put both lines under the control of the holding company, which was created solely for that purpose.

The facts disclosed on the trial showed that the two great railways sought to be merged were engaged in active competition for freight and passenger traffic across the continent, through the northern tier of States from Minnesota and the Great Lakes to the Pacific ocean, the two lines including branches aggregating about 9,000 miles of road, each road connecting at its respective terminals with lines of railway, with lake and river steamers, and with sea-going vessels. The terms of the agreement of merger in effect provided that the holders of stock of the competing companies should turn it over to the *holding* company to effect a complete consolidation of both roads. Thus, "by making the stockholders of each system jointly interested

in both systems and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of directors and officers of each system in a common body, to-wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

It was alleged also in the bill that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railroad companies. The exchange value of the stock of the latter was \$400,000,000. The subscribed capital of the holding company was but \$30,000, but its authorized capital was \$400,000,000, which was \$122,000,000 in excess of the par value of the stock of both companies. Four hundred million dollars represented the exchange value of the railroad stock. This stock of the holding company was to be issued for the stock of both companies, 55 per cent. of which would go to holders of Great Northern, and the balance, 45 per cent., to holders of Northern Pacific stock.

Upon the pleadings and proofs, the lower court, in an elaborate and exhaustive opinion by Judge THAYER, concurred in by all the judges, sustained the bill and granted the relief substantially as prayed for. The Supreme Court affirmed the decree in a comprehensive opinion by Mr. Justice HARLAN, concurred in by Justices BROWN, MCKENNA, and DAY. Mr. Justice BREWER also voted for affirmance, writing a separate concurring opinion.

Justice WHITE wrote a dissenting opinion concurred in by Chief Justice FULLER, and Justices PECKHAM and HOLMES, the latter writing also a separate dissenting opinion.

The Naked Right to Acquire Stock not Questioned.—It was argued in behalf of defendants in the *Merger* case that the matter complained of was a mere business transaction as to the purchase of stock with which the government of the United States had no concern. In their behalf it was urged that, after

all, the main question involved was the right of the Northern Securities Company, a New Jersey corporation, to acquire and hold stock in other State corporations. Mr. Justice HARLAN, in this connection, observed that no person contended that Congress could control the mere acquisition or mere ownership of stock in a State corporation engaged in interstate commerce. That the government complained, not of the purchase of stock, but of the existence of a combination among stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designed to act for both companies in repressing free competition between them. "Independently of any question of the mere ownership of stock, or of the organization of a State corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act."

Dividends on \$122,000,000 of Watered Stock.— It was argued in the *Merger* case that there was no intention on the part of defendants to create a monopoly or to restrain trade or commerce. In this connection it will be observed that the *par value* of the stock of the two competing railroads was \$278,000,000. That the *exchange* value was \$400,000,000. It was shown that the stockholders of the two railroad companies would receive for their stock certificates to be issued by the Northern Securities Company aggregating \$400,000,000, which was the amount of stock it was authorized to issue. In this transaction the holders of railroad stock would receive not \$278,000,000 of securities' stock, but \$400,000,000 of the latter. In other words, the railroad stockholders would get not only the par value of their stock, but by way of bonus, \$122,000,000 of watered stock.

It will be observed that by pooling the earnings of both railroads for the benefit of the holders of Northern Securities stock, care would be taken that the holding corporation was vested with power which made it the duty of the securities company to promote not the interests of one system at the expense of the other, but of both at the expense of the public. The stockholders, in the language of Justice HARLAN, "will take care that no persons are chosen directors of the holding company who will

permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act — ‘combination in the form of a trust or otherwise * * * in restraint of commerce.’”

The earning of the two railroads is the only source from which must come the money with which to pay a dividend on the \$122,000,000 of watered stock in the hands of the combine. The money must come from the shipper and consumer — the general public — for there is no other source.

The Holding Company a Mere Device.— In further answer to the argument that Congress had no power to prohibit the mere acquisition or ownership of stock in a corporation engaged in interstate commerce, Mr. Justice HARLAN observes that the government makes no such contention, and takes no such position. The question, and the only question, concerned the real nature of the transaction and the purposes sought to be accomplished by it. The claim of the government was that the holding company was a mere device to cover an unlawful combination to destroy competition between carriers. The principal was applied, that what is forbidden to be done directly, cannot be accomplished indirectly. The court says:

“The purpose of the combination was concealed under very general words that gave no clew whatever to the real purposes of those who brought about the organization of the securities company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between competing parallel lines of interstate carriers, all would have seen at the outset that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress. * * * It cannot be said that any State may give a corporation created under its laws authority to restrain interstate or international

commerce against the will of the nation as lawfully expressed by Congress. * * *

"The stockholders of these two competing companies disappeared as such for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interest of both sets of stockholders as a unit and to manage, or cause to be managed, both lines of railroad as if held in *one ownership*. Necessarily by this combination or arrangement the holding company, in the fullest sense, dominates the situation in the interests of those who were stockholders of the constituent companies; as much so for every practical purpose as if it had been itself a railroad corporation which had built, owned, or operated both lines for the exclusive benefit of its stockholders. Necessarily also, the constituent companies ceased under such a combination to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation by the name of a holding corporation, the principal if not the sole object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. *Northern Securities Co. v. United States*, 193 U. S. 197.

Concurring Opinion.—BREWER, J.—Mr. Justice BREWER voted for affirmance in a separate concurring opinion in which he said, that while he could not assent to all that was said in the opinion of Justice HARLAN, he deemed the agreement to merge the carrying corporations an unreasonable combination in restraint of interstate commerce. Justice BREWER said in part:

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended. * * *

"There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the

control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the securities company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the securities company was a mere incident, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out."

Territory Affected by Merger Decision.—The territory affected by the railway combination attempted through the instrumentality of the Northern Securities Company, as trustee for the merged lines, embraced eighteen States between the Great Lakes and the Pacific ocean, to-wit: Illinois, Wisconsin, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Kansas, Nebraska, Colorado, Wyoming, Montana, Utah, Idaho, Nevada, California, Oregon, and Washington. It was shown that prior to the attempted merger, and with a view to their final consolidation, the Northern Pacific and Great Northern companies united in the purchase of the stock of the Chicago, Burlington and Quincy Railway Company, giving in payment upon an agreed basis of exchange the joint 4 per cent. bonds of the Great Northern and Northern Pacific, payable in twenty years. This gave the combination control, by its main line and branches, of the territory indicated connecting at Omaha, Kansas City, Cheyenne, Denver, Helena, Spokane, and Portland with the Union Pacific system.

The merger agreement, therefore, while it did not embrace within its terms the Union Pacific lines, gave the combination

practical control of its territory in the States indicated. The map in the front of the book shows the territory reached and embraced within the proposed combination of the Northern Pacific and Great Northern, and the Chicago, Burlington and Quincy, aggregating, including main line and branches, about 9,000 miles of road. (See map facing Preface.)

Merger Injunction.—The injunction granted in the *Merger* case, embracing the relief prayed for by the government, is as follows:

“That the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends* to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring

* The injunction as to payment of dividends was subsequently modified in so far as to permit the payment of the dividends pending appeal, upon defendant giving a bond for \$50,000, conditioned to prosecute the appeal and pay all damages resulting from the order of modification.

to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Professional Comment — Views of Judge Dillon on Merger Decision.— The general interest everywhere manifested by the *Merger* decision was reflected in the public press. Public men and prominent lawyers were interviewed and contributed to the discussion. Some of their observations are valuable as indicating the views of the legal profession throughout the country on a question of universal interest and importance. Governor Van Zandt, of Minnesota, who led the fight in the suit brought by his State seeking to prevent a similar merger, declared that in his opinion the decision meant more to the people of Minnesota and the Northwest than any event since the civil war. The views of counsel for other great railway systems are of special interest, in view of the fact that there have been many consolidations and assignments of leases of railway companies in accordance with State laws. In such cases, however, it has always been claimed that they were sanctioned by the laws of the States where the consolidation or merger took place, and that the transactions did not directly restrain interstate commerce. In this connection, the views of Hon. John F. Dillon, former judge of the United States Circuit Court, are interesting. Judge Dillon is known as one of the foremost railroad lawyers, and represents the Gould interests. He is a well-known author, having written "Dillon on Municipal Corporations" and other valuable works, including his "American Jurisprudence."

From the standpoint of counsel for a vast system of railways the views of Judge Dillon will attract attention. His opinion on the *Merger* decision was sought by the New York HERALD. He prepared for that great newspaper the following statement, which was published in its issue of March 15, 1904:

Decision not a Precedent.—“Every judicial decision must be construed with reference to the particular facts on which such decision is rendered. The *Northern Securities* case, in its facts, is limited to a case of a corporation not owning any railway, and not organized to do any business of its own, and not having any substantial capital of its own, but created expressly to act as a custodian or holder of the shares of two parallel and competing railroad companies, and to control the same through the corporate organization of such holding company, contrary to the Constitutions and statutes of the States which created such parallel and competing companies.

“For no other case would this *Northern Securities* be what lawyers would call a precedent; that is, it would not necessarily control cases not like it in its essential facts. The *Northern Securities* decision, therefore, has no necessary application to ordinary railway consolidations, leases, and purchases authorized to be made and made in conformity with the laws of the States which created the railways and in which they are situated.

Majority Opinion Logical.—“The opinion of the majority of the court in the *Northern Securities* case is the necessary or almost inevitable logical effect of the prior decisions of the Supreme Court in the *Trans-Missouri Association* and *Joint Traffic* cases. In those cases, notwithstanding the arguments against the views which a majority of the court reached, which were made by Mr. Phelps, Mr. Choate, Mr. Carter, and myself, a majority of the court reached the conclusion that the Sherman Anti-Trust Act included all contracts in restraint of interstate commerce or trade, even though such contracts were in and of themselves reasonable.

“Considering the judges who took part in the *Trans-Missouri Association* and *Joint Traffic* cases, and the judges taking part in the recent *Northern Securities* decision, I cannot interpret the recent decision otherwise than as marking, or if not actually marking, foreshadowing a recession from the extreme high-water mark of those cases, in so far as they hold that the Anti-Trust Act of Congress prohibits any and all reasonable arrangements, even though they are not in restraint of trade — a recession that, it seemed to me, was bound to come.

Decision will Prove a Benefit.—“All the circumstances, as well as the language of the various judges in the recent opinions, make it clear to my mind that the *Northern Securities* case is not a precedent; that is, that it will not necessarily control any other case where the facts are essentially different. Thus viewed this decision should not cause alarm or unsettle railway values. Thus limited — to express simply my own impressions and views — it will probably prove in the long run a benefit to railway properties and investments and possibly to the public at large.

“Uncontrolled power in a few men by any form of corporate device to control the railway systems of a great country is a power too great to be compatible with the public weal, and one which would not be permanently endured by the people.”

“Confining the case to its precise circumstances, and extending it no further, I answer your question as to whether it has the approval of my judgment as a lawyer by saying yes, and I repeat that I do not think it can successfully be used to defeat pre-existing or other arrangements made under the authority of the laws of the several States in the way of consolidations, leases, and otherwise which were not intended to, and do not directly — mark my words, I say directly — actually interfere with interstate commerce.”

The Beef Trust.— One of the most formidable of the modern industrial combinations whose transactions have been the subject of judicial inquiry is the combination familiarly called the Beef Trust. It is more widely known than other combinations, for the reason that its operations affect the meat supply of the country. The price of meat presents a question of universal interest. It is claimed that in committee the trust daily fixes the price. The litigation with respect to the legality of this combination is pending in the Supreme Court of the United States, but has not yet been argued. The trust suffered defeat in the United States Circuit Court, northern district of Illinois, in a suit brought in behalf of the United States, in which Judge Grosscur, applying the rules laid down in the *Addyston Pipe* case in which the mode of transacting business was similar to that employed by the beef trust, granted an injunction perpetual, forbidding the continuance of the acts of defendants set forth in the bill.

The court, in granting the relief prayed for, held that commerce includes the sale or exchange of commodities, but is not restricted to specific acts of sale or exchange. It includes intercourse — all the initiatory and intervening acts, instrumentalities, and dealings — which bring about such sale or exchange. When such commerce is between parties from different States, or is affected by transportation from State to State, it becomes “commerce between the States” which Congress has power to regulate within the meaning of the Sherman Act. *United States v. Swift*, 122 Fed. Rep. 529 (April, 1903, Cir. Ct. No. Dist. Ill.).

The case cited arose upon demurrer to the bills, and a motion by plaintiff for an injunction. The court overruled the demurrers and granted a preliminary injunction restraining the acts complained of. It was alleged that defendants, who included seven corporations, one co-partnership, and twenty-three other persons, controlled 60 per cent. of the trade in fresh meats in the United States. They were engaged in the purchase of live stock from various States, which were converted into fresh meat which was sold by defendants, or through their agents, to consumers in different States. These facts were held to constitute interstate commerce. The court held that the character of such transactions is not altered by the fact that the fresh meats in the hands of agents may be subject to ordinary State taxation. Because an article of commerce can be taxed it does not follow, from that fact alone, that it is not subject to Federal control as interstate commerce. Commerce, whether interstate or domestic, is subject to the police power and taxing power of the State. So long as the exercise of such power does not restrain or regulate interstate commerce and Federal control it may be lawfully exercised. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Austin v. Tennessee*, 179 U. S. 349; Prentice & Egan on Commerce Clause, page 27. *Ib.*

Beef Trust an Unlawful Combination.— On the branch of the case in which defendants claimed that they were not an unlawful combination, it was alleged that they were guilty of the following acts: (a) Directing their purchasing agents to refrain from bidding against each other at auction sales of live stock; (b) in bidding up the price of such stock for a few days at a time to induce large shipments, and then ceasing to bid to obtain the stock thus shipped at less than ruling-market prices; (c) in agreeing upon prices to be adopted by all, and restricting the output or quantities of meat shipped; (d) in directing uniform prices for cartage and delivery throughout the United States as a device to increase the price to dealers and consumers, and (e) in negotiating with carriers for secret rebates on their enormous shipments, thus bringing about unjust discrimination against other shippers and competitors for the purpose of stifling and destroying competition. The court, GROSSCUP, J., held that these facts con-

stituted an unlawful combination and conspiracy within the meaning of the Sherman Act because it was in restraint of trade and commerce. Whether such restraint was, or was not, unreasonable was wholly immaterial. *United States v. Trans-Missouri Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 558. The court held that the bill of complaint charged an unlawful conspiracy and combination in restraint of trade and commerce within the meaning of the Sherman Act, overruled the demurrers interposed by defendants, and granted a preliminary injunction. *United States v. Swift*, 122 Fed. Rep. 529 (April, 1903, Cir. Ct. No. Dist. Ill.).

Pleadings — Beef Trust Case.— The petition filed on behalf of the United States in the Beef Trust case may be summarized as follows:

First. "That at the time of its filing they had been and then were engaged in the business of buying live stock at divers points throughout the United States, where stockyards existed, and slaughtering the same at such places in different States and converting the same into fresh meats for human consumption.

Second. "That they had been and then were engaged in the business of selling such fresh meats at the places where prepared, to dealers and consumers in divers other States and Territories of the United States and in foreign countries, and shipping the same when so sold, from said places of preparation to such dealers and consumers, pursuant to such sales, and were thus engaged in trade and commerce among the several States and Territories and with foreign nations.

Third. "That they had been and then were engaged in the business of shipping such fresh meats from said points where so prepared, by common carriers to the respective agents of the defendants located at and near the principal markets of such meats in other States and Territories and in foreign countries for sale by those agents in those markets to dealers and consumers, which they there sold through their agents and were thus engaged in trade and commerce among the several States and Territories and with foreign nations.

Fourth. "That of the total volume of trade and commerce among the said States and Territories in fresh meats the said defendants together controlled about 60 per cent.

Fifth. "That as to such trade and commerce among the several States and Territories and foreign nations in fresh meats, the said defendants should, and but for the acts hereinafter complained of would be, and remain in competition with each other.

Sixth. "That said defendants, in violation of the act of Congress of July 2, 1890, chap. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200), and in order to restrain competition among themselves as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intended to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stockyards and markets where they customarily purchase such live stock, which live stock is produced and owned principally in other States and Territories of the United States, and shipped by the owners thereof to such stockyards for competitive sale, to refrain from bidding against each other when making purchases of such live stock, and by these means inducing and compelling the owners of such live stock to sell the same at less prices than they would receive if such bidding were competitive; which combination and conspiracy is in restraint of trade and commerce among the several States, etc.

Seventh. "That said defendants, in further violation of said act, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up through their agents the prices of live stock for a few days at said stockyards, thereby inducing shippers from other States and Territories to make large shipments of such live stock to such stockyards, and then refrain from bidding up such live stock, and thereby obtaining such live stock at prices much less than it would bring in the regular way of trade.

Eighth. "That said defendants, in further violation of said act, and in order to restrain and destroy competition among themselves as to such trade and commerce and to monopolize the same, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily, from time to time, lower and fix prices, and maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout said States and Territories and foreign countries. That the arbitrary raising, lowering, fixing, and maintaining of said prices is effected through the action of divers of their agents in secretly holding periodical meetings, and there agreeing upon the prices to be adopted by said defendants respectively in such trade and commerce, which said prices are notified by letters and telegrams, and are adhered to in their sales, which are made directly, and among other ways; and by collusively restricting and curtailing the quantities of such meats shipped by them in pursuance of such combination, and imposing

against each other divers penalties for any deviations from such prices, and establishing a uniform rule for the giving of credit to dealers throughout the said States and Territories and foreign countries, and for the conduct of the business of such dealers, with penalties for violation thereof, by notifying each other of the delinquencies of said dealers, and keeping what is commonly known as a 'black list' of such delinquents, and refusing to sell meats to any of such delinquent dealers.

Ninth. "And the said defendants, in violation of the provisions of the said act, have engaged in, and intend to continue, an unlawful combination and conspiracy, to direct and require their respective agents at and near many of the markets for such fresh meats throughout the United States and Territories to arbitrarily make and impose uniform charges for cartage for delivery, upon making such sales to dealers and consumers in those markets of the meats shipped to them through said agents by the said defendants respectively from their several points of preparation, thereby increasing the charges for such meats to said dealers and consumers.

Tenth. "That notwithstanding the common carriers by railroad subject to the provisions of the laws of the United States for the regulation of commerce have established and published their schedule of rates, fares, and charges for the transportation of live stock, and for the transportation of meats, which are the only lawful rates for such transportation, the said defendants, intending thereby to monopolize the commerce aforesaid, and prevent competition therein, have made and are making agreements and arrangements with divers officers and agents of such common carriers whereby the said defendants were to receive, and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, less than the lawful rates, which rebates they divide among themselves and will continue to do so unless restrained by the injunction of this court, which is a scheme to monopolize, and also a combination and conspiracy in restraint of trade and commerce among the several States and Territories and with foreign nations.

Eleventh. "That the said defendants now are, and for years past have been, in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its Territories and foreign countries, to that end the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable and arbitrary regulations for the conduct of their own and each other's business, effecting the same from the shipment of the live stock from the plains to the final distribution of

the meats to the consumer. All to the injury of the people and in defiance of law."

Grounds of demurrer.—To this petition five of the defendant corporations filed joint and several demurrers, the grounds of which are as follows:

"The bill of complaint does not allege any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce within the meaning of said act of Congress of July 2, 1890, chap. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200).

"The bill of complaint does not allege any acts of defendants monopolizing or attempting to monopolize, or combining or conspiring to monopolize any part of such trade or commerce within the meaning of said act.

"If the act of Congress in question should be given a construction which would sustain this bill of complaint such act would violate the provisions of the Constitution of the United States.

"Said bill is multifarious.

"There is a misjoinder of causes of action and of persons in said bill, as alleged in said demurrers.

"The said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite."

Beef Trust Injunction.—The injunction was granted by Judge GROSSCUP in the *Swift* case in April, 1903, and was made permanent May 26, 1903. The injunction is as follows:

"That [names defendants, seven corporations, one co-partnership, and twenty-three other persons] and each of them, their respective agents and attorneys and all persons acting or claiming to or assuming to act under their authority, or that of any of them, be enjoined and restrained from entering into, taking part in, or performing any contract, combination, or conspiracy, the purpose or effect of which will be as to trade and commerce in fresh meats a restraint of trade or commerce among the several States, Territories and the District of Columbia, either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock, or collusively and by agreement refraining from bidding against each other at such sales or by arbitrarily raising or lowering prices, or fixing uniform prices at which said meats will be sold, either directly or indirectly through their respective agents, or by curtailing the quantity of such meats shipped to such mar-

kets and agents, or by imposing penalties for deviations from prices; or by establishing and maintaining uniform rules for the giving of credit to dealers in such matters, or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, or by any other method or device the purpose and effect of which is to restrain trade and commerce as aforesaid."

The second paragraph of the injunction enjoined them from receiving rebates from railroad companies, the effect of which was to give them a monopoly by making it impossible for outsiders to compete.

Coal Trust Illegal.— A contract was made by a number of persons engaged in mining coal and making coke, whereby a corporation agreed to take the entire output of the mines and ovens of the other parties, which is intended for the "western shipment." It also agreed to sell the same in certain States at not less than a minimum price to be fixed by an executive committee under the contract, the seller agreeing to pay over to the producers the entire proceeds over a fixed price per ton, the selling corporation agreeing to keep the overplus as and for its compensation. The purpose of the agreement was stated to be "to enlarge the Western Market."

The Attorney-General filed a bill in equity to dissolve the combination, and for an injunction perpetual to enjoin the execution of the contract as an unlawful conspiracy in restraint of trade. *Held*, that the contract, in so far as it affected interstate trade and commerce was in restraint of trade and commerce, and was illegal and void. That the agreement was in actual restraint of trade and commerce, and that an injunction issue restraining defendants from selling and shipping coal and coke into other States under the contract, and that the combination of defendants thereunder be dissolved. (August 31, 1900.) *United States v. Chesapeake Co.*, 105 Fed. Rep. 93.

Act Retroactive.—The Sherman Act operates upon contracts in existence at the time of its passage. The fact that such agreements were made prior to the passage of the act is immaterial. The statute creates a remedy, and if the mischief to be corrected exists, the courts may apply the remedy, even though the contract giving rise to the acts complained of were made before the act was passed. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

Act Applies to Common Carriers.— The Sherman Act applies to every contract or combination in restraint of interstate or foreign commerce, whether made or entered into by common carriers engaged solely in transportation or by persons or corporations engaged in the manufacture, purchase, and sale of commodities. The act prohibits agreements if they are in restraint of such trade, whether the agreements in themselves are reasonable or unreasonable. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

Eighteen railroad companies operating competing lines formed an association designated the Trans-Missouri Freight Association for the purpose of establishing and maintaining uniform rates and preventing rate cutting, and providing penalties to be imposed upon members for a violation of its rules. The agreement did not provide for pooling freights or dividing the aggregate proceeds of the pool. In that regard the agreement did not violate the Interstate Commerce Act. (§ 5.) The agreement was filed with the Interstate Commerce Commission, and the schedule of rates therein agreed upon was posted and published. The United States filed a bill praying for a dissolution of the association, and to have the agreement declared illegal as in restraint of trade and commerce in violation of the Sherman Anti-Trust Law. That it was oppressive, intended to increase rates, and stifle competition, and created a monopoly. Defendants claimed that the agreement was not forbidden by the Interstate Commerce Act, that the Sherman Act did not apply to common carriers, and that the agreement was in itself reasonable and just, and that the association had been dissolved pending the appeal. The bill was dismissed below; the judgment affirmed in the Circuit Court of Appeals. The Supreme Court reversed the judgment, and held that by its terms the Sherman Act embraced every contract in restraint of trade, whether made by common carriers or manufacturers and dealers engaged in the purchase and sale of commodities. That if the agreement complained of was in restraint of trade, it was condemned by the act whether it was regarded in itself as reasonable or unreasonable. That the Sherman Act did not conflict with the Interstate Commerce Act, but was in harmony with it. *Ib.*

It was held further that the mere fact that the association

had been dissolved pending the appeal did not oust the court of jurisdiction to pass upon the validity of the agreement complained of. That the United States had rights with respect to the questions involved, of which it could not be deprived by acts of defendants in voluntarily dissolving their association. *Ib.*

Injunction — Violation of Sherman Act will not Defeat Right to.— The charge that a plaintiff seeking an injunction to restrain defendant from manufacturing or selling certain electrical appliances in violation of plaintiff's patents is guilty of a violation of the Sherman Anti-Trust Law of July 2, 1890, is no reason why the court should not restrain defendant from infringing the patent. It is difficult to understand, said the court, how or why a violation of the Sherman Anti-Trust by this complainant, if there has been such a violation, confers any right on defendant to infringe this patent, nor will the fact that defendants are amply responsible and able to respond in damages defeat plaintiff's right to an injunction which is the appropriate and adequate remedy. *Gen. Electric Co. v. Wise*, 119 Fed. Rep. 922.

Ticket Scalping — Pooling as a Defense to an Action against Ticket Brokers.— It is a defense to a suit in equity brought by the carrier for an injunction to restrain defendants, who were ticket brokers, from selling portions of non-transferable tickets at cut rates, that plaintiffs in issuing such tickets were guilty of an unlawful conspiracy against trade and commerce in violation of the Sherman Act. *Delaware Railroad v. Frank*, 110 Fed. Rep. 689 (August, 1901, Cir. Ct. No. Dist. N. Y.).

Plaintiff, a carrier and citizen of Pennsylvania, sued sixty-one defendants, alleging that they were citizens of New York doing business at Buffalo, for an injunction to restrain them from selling non-used portions of excursion tickets for a round trip to the Pan-American Exposition at Buffalo, which tickets were issued at reduced rates and were made non-transferable, and good only for a limited period. The tickets were issued by plaintiff in conjunction with other carriers. Defendants objected to the jurisdiction on the ground that some of the defendants were citizens of Pennsylvania, the same State in which plaintiff re-

sided, as to whom the court had no jurisdiction, there being no diversity of citizenship, and no Federal question being involved. That in dismissing the bill as to some of the defendants the court must dismiss as to all for want of jurisdiction. Defendants claimed also that in issuing the tickets, which were the subject of the injunction sought, defendants, in conjunction with other carriers, were engaged in an unlawful combination and conspiracy in open violation of the Anti-Trust Law, known as the Sherman Act, in pooling issues and creating a monopoly. Defendants claimed that he who comes into equity must come with clean hands, and that plaintiff could not violate the law, in issuing tickets, and then invoke the power of a court of equity to secure the aid of such court to enable it to consummate and continue their unlawful acts. It was claimed that plaintiff was a member of the "Trunk Line Association" and was also a member of the "Trunk Line Committee." That the association was engaged in pooling railway rates and fares for transportation, to avoid competition between the several lines controlled by the association, which acted through a trunk line passenger committee, composed of the general passenger agents of the principal roads. That the rates and conditions of the Pan-American round-trip excursion tickets were fixed by such combinations arranged to stifle competition in rates and an agreed *pro rata* division of all receipts from the sale of such tickets. That plaintiff acted also in conjunction with the Central Passenger Association. These facts were not denied. *Ib.*

The court held, that upon the undisputed facts, the tickets, which were the subject-matter of the action, were issued in pursuance of a combination and agreement expressly forbidden by law. The plaintiff could not invoke the aid of a court of equity to enable them to consummate an act which the law forbids, and which is declared to be unlawful. That complainant did not come before the court with clean hands and must, therefore, be relegated to a court of law. Injunction vacated. *Ib.*

As to the question of jurisdiction the court held that it might dismiss the bill as to those residing in the same State in which plaintiff resided, and retain jurisdiction as to the remaining defendants, if this could be done without prejudice to the remain-

ing defendants, and the presence of the excluded defendants was not essential or indispensable or prejudicial to the entry of a decree against the remaining defendants. *Ib.*

State Anti-Trust Law — Provisions of, cannot be Invoked Collaterally.— Before a defendant can evade the payment of purchase price of commodities actually received on the ground that the seller is a trust or combination in restraint of trade contrary to the provisions of a State statute (Anti-Trust Law of Illinois, act of 1891), there should be an adjudication of a competent tribunal in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination within the statute. When sued for the purchase price of commodities, the defendant cannot, by way of defense, plead that plaintiff is a trust within a State statute as the issue pleaded is *collateral* to issue tendered by the plaintiff. *Lafayette Bridge Co. v. City of Streator*, 105 Fed. Rep. 729.

§ 2. Misdemeanor to Combine.— Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Criminal Liability — Imprisonment.— Section 2 of the Sherman Act which declares a violation of its provisions to be a misdemeanor, prescribes imprisonment as one of the penalties. The court may impose a fine not exceeding \$5,000 or imprisonment not exceeding one year, or both fine and imprisonment in the discretion of the court.

The imprisonment penalty was abolished by section 1 of the Elkins Act (*ante*, page 134) in so far only as relates to violations of the Interstate Commerce Act or section 1 of the Elkins

Act. The clause of the latter act, however, abolishing imprisonment as a penalty, does not in terms extend to the Sherman Act or to any of its provisions. It abolishes the punishment by imprisonment only in case of convictions under the Interstate Commerce Act or amendments thereto, or for offenses under section 1 of the Elkins Act.

§ 3. Contract in Restraint of Trade, Illegal — Penalty.— Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 4. Remedy Injunction — Jurisdiction of Federal Court.— The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case

and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Witnesses must Testify.—Prior to the act approved February 25, 1903, there was no way in which a witness could be compelled to testify in a proceeding under the Sherman Act before the grand jury as to the witnesses' connection, participation in, or knowledge concerning a combination to regulate commerce, and control the price of commodities. *Foot v. Buchanan*, 113 Fed. Rep. 156 (January, 1902, Cir. Ct. No. Dist. Miss. W. D.).

The court held that section 860 of U. S. Rev. Stat. which provides that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, for the reason that the section in question contains no specific provision that such witness shall not be prosecuted for the offense which may be disclosed by his testimony, and that the provisions of the act of February 11, 1893, applied only to the Interstate Commerce Act and had no application to the Sherman Act. *Ib.*

In view of the ruling that the Sherman Act was practically inoperative by reason of the difficulty in securing evidence in proceedings to enforce its provisions Congress, in the act of February 25, 1903, appropriating half a million dollars to enable the Attorney-General and the Department of Justice to prosecute proceedings under the Sherman Act and the Interstate Commerce Act, extended to the former as well as the latter the provisions of the act declaring that no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts.

The decisions holding that this language declaring expressly

that a witness shall not be prosecuted, is sufficient to authorize the court to compel the witness to testify and produce books, papers, and documents, when properly subpoenaed, are now applicable under the Sherman Act.

These decisions will be found under section 12 of the Interstate Commerce Act, *ante*, page 184 *et seq.*

The provisions of chapter 755, Laws 1903, approved February 25th of that year, appropriates \$500,000 to enforce the Commerce Act and Anti-Trust Laws, and takes away the right to prosecute a witness "who shall testify or produce evidence documentary or otherwise" under either the Interstate Commerce Act, the Sherman Act, or the anti-trust provisions of the Wilson Bill. These provisions of the statute are as follows:

Witnesses under Sherman Act not to be Prosecuted.— That for the enforcement of the provisions of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of

the United States: *Provided*, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (*Laws 1903, chap. 755, approved February 25, 1903.*)

§ 5. **Additional Parties may be Brought in.**— Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6. **Trust Property, when Confiscated.**— Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 7. **Suits by Injured Parties — Treble Damages.**— Any person who shall be injured in his business or property by any other person or corporation by reason of anything

forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Commercial Boycott — Treble Damages.—Any person injured in his business by reason of any act, combination, or conspiracy, condemned or forbidden by the Sherman Act, may bring an action under section 7 for damages in a Circuit Court of the United States, irrespective of the amount in controversy, and shall recover threefold damages, the costs, and an attorney's fee. A commercial boycott, whereby a syndicate or trust dealing in tiles, grates, and mantels, shipped from other States, undertook to discriminate against a dealer not a member of the association, was held to be within the purview of the Sherman Act. *Montague v. Lowry* (February, 1904), 193 U. S. 38. Edward S. Lowry & Co., plaintiffs in the case cited, claiming to have been damaged by the boycott, sued the officers of the Tile, Mantel and Granite Association of California, and the association, the offending trust, in a Circuit Court of the United States in San Francisco, under the Sherman Act for the injury claimed to have been sustained by the boycott. Plaintiffs were wholesale dealers in tiles, mantels, and grates in San Francisco. Defendants and constituent members of the trust were also dealers in the same articles. No tiles were manufactured in California and plaintiffs and those defendants who did business in California purchased their goods from manufacturers in other States, who were made defendants in the action. All tiles purchased by the California parties were shipped from outside the State. The business so conducted was held to constitute interstate commerce.

The combination or syndicate complained of was formed in 1898. It was an unincorporated association governed by a constitution and by-laws, which provided substantially as follows:

Constitution of the Tile Trust.—The constitution which governed the association, article I. section 1, provided that any in-

dividual, corporation, or firm engaged in or contemplating engaging in the tile, mantel, or grate business in San Francisco, or within a radius of 200 miles thereof (not manufacturers), having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws governing the association. The initiation fee was, for active members, \$25, and for non-resident members, \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

By-Laws of the Tile Trust.—The by-laws of the defendant association in the *Montague* case, after providing for the settlement of disputes between members and customers by reason of liens, foreclosure proceedings, etc., enacted in article III as follows:

SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than "list prices" to any person or persons not a member

of this association, under penalty of expulsion from the association.

SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel & Grate Association of California, shall forfeit their membership in the association.

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tile were sold by a member to any one not a member, they were sold at the list prices so adopted, which were more than 50 per cent. higher than when sold to a member of the association.

Tile Trust Illegal.— Plaintiffs proved that prior to the formation of the trust they did a profitable business and were competitors of all the defendants who were dealers in tiles in San Francisco. Prior to the formation of the trust plaintiffs purchased all their tile from manufacturers in eastern States (who were defendants in the action) all of whom had subsequently joined the trust. That after the trust was formed plaintiffs could not purchase tile from the manufacturers at any price, but were obliged to purchase them from San Francisco dealers at "list prices" which was 50 per cent. over the price at which members of the trust could purchase them. That before the trust was formed plaintiffs could purchase tile, and did purchase tile from the manufacturers at much less cost than it was possible for them to do after the trust association was formed. Plaintiffs showed that they were not members of the trust, never had been, never applied for membership, and had never been asked to join. That there were members of the association who were hostile to plaintiffs and that it required a unanimous vote to secure membership. Defendants showed that the condition in constitution requiring members to carry not less than \$3,000 worth of stock had not always been enforced, but there was no proof that the provision had been repealed. Plaintiff had a verdict for \$500 which was trebled, and the court after five days' trial, on proof that the value of the services was from \$750 to \$1,000, awarded plaintiffs and an attorney's fee of \$750. Affirmed at Court of Appeals and in Supreme Court.

The court, Mr. Justice PECKHAM writing the opinion, held, unanimously, that the result of the agreement entered into by the trust when carried out was to prevent dealers in tiles in San Francisco, not members of the association, from purchasing the same on any terms from any of the manufacturers who were such members from whom plaintiffs had purchased tile prior to the formation of the association. That by the agreement a non-member of the association was prevented from purchasing tile from San Francisco dealers who were members, unless upon paying a greatly enhanced price over what he would have paid manufacturers or San Francisco dealers prior to the formation of the association. "The agreement, therefore," says PECKHAM, J., "restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member." The court observed also that it was not a simple agreement of manufacturers, refusing to sell to certain other persons. It was an agreement between manufacturers and dealers belonging to the association not to purchase from manufacturers not members, and not to sell unset tile to any one not a member for less than a "list price" which was 50 per cent. higher than prices charged to members; while manufacturers who were members agreed not to sell to any one not a member. The sale of unset tile in California ceases to be a State transaction because it forms part of a scheme with manufacturers in other States to enhance prices, and the agreement is not separable, but must be construed as a whole. Plaintiffs could not be compelled to join the association even if they could do so, and could not be legally put under obligation to become members in order to enable them to transact business. The award of the attorney's fee was discretionary, and no abuse of discretion was shown in awarding it. *Montague v. Lowry*, 193 U. S. 38.

Treble Damages — Member of Combination cannot Sue for. — The provisions of section 7 of the Sherman Act which declares that any person, who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared unlawful by the act, may sue and recover treble

damages for the injuries sustained has no application to one who is himself a party to the trust. *Bishop v. American Preserves Co.*, 105 Fed. Rep. 845.

Plaintiff was a party to a contract to form a corporation to purchase and control the manufacture of preserves throughout the United States, and was obliged to transfer his plant and factory to the corporation. Disagreements and disputes having arisen in the corporation plaintiff brought replevin to recover the property he had transferred to the trust, and alleged that defendant was an illegal combination in restraint of trade. *Held* on demurrer, that plaintiff being himself a member of the combination could not maintain the action. *Ib.*

§ 8. **Persons Defined.**— That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Anti-Trust Provisions of Wilson Bill.— The Wilson Bill (Laws 1894, chap. 349), which became a law without the President's approval, August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the government, and for other purposes," contained certain provisions forbidding unlawful restraints and monopolies by and between importers or persons or corporations engaged in importing "any article from any foreign country into the United States, when designed to operate in restraint of lawful trade or free competition in lawful trade or commerce, "or to increase the market price in any part of the United States" of imported articles, or "of any manufacture into which such imported article enters or is intended to enter." A violation of the act is declared to be a misdemeanor, punishable by fine or imprisonment. A remedy by injunction is also provided, and an action for treble damages to any person injured.

When a new tariff bill was passed in 1897, entitled "An Act to provide revenue for the government and to encourage the in-

dustries of the United States," known as the Dingley Bill (Laws 1897, chap. 11, approved July 24, 1897), Congress expressly retained in full force and virtue the sections of the Wilson Bill (sections 73, 74, 75, 76, and 77) relating to trust agreements entered into by importers, and these sections of the Wilson Bill are still in force. The anti-trust provisions of the Wilson Bill are as follows:

§ 73, Wilson Bill.—**Trusts and Monopolies by Importers.**—That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

§ 74, Wilson Bill.— Remedy — Injunction, Jurisdiction of Federal Court.— That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 75, Wilson Bill.— Additional Parties may be Brought in.— That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 76, Wilson Bill.— Trust Property, when Confiscated.— That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section seventy-three of this Act, and being in the course of transpor-

tation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 77, *Wilson Bill*.— **Suit by Injured Parties — Treble Damages.**— That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Wilson Bill Continued by Dingley Bill.— Section 34 of the Dingley Bill (Laws 1897, chap. 11) continues in force the anti-trust provisions of the Wilson Bill, by the following proviso:

And provided further, That nothing in this Act shall be construed to repeal or in any manner affect the sections numbered seventy-three, seventy-four, seventy-five, seventy-six, and seventy-seven of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," which became a law on the twenty-eighth (should be twenty-seventh) day of August, eighteen hundred and ninety-four. (Dingley Bill, § 34, approved July 24, 1897.)

CHAPTER IV.

BUREAU OF CORPORATIONS.

The Act Creating Bureau of Corporations and Authorizing Publicity with Regard to the Business and Management of Corporations. Entitled An Act to Establish the Department of Commerce and Labor. Laws 1903, Chap. 552. Approved February 14, 1903.

In order to secure reasonable publicity in regard to the management and business of corporations engaged in interstate commerce, except carriers under the Interstate Commerce Act, and as a supplement to the Sherman Anti-Trust Law, Congress, by the Act entitled "An Act to establish the Department of Commerce and Labor" (Statutes, chap. 552), approved February 14, 1903, placed such business and manufacturing corporations, and joint stock companies or associations under the supervision of an officer designated the Commissioner of Corporations. The Act confers upon the Commissioner powers analogous to those exercised by the Interstate Commerce Commission with respect to corporations engaged as common carriers of interstate commerce. This Bureau and its Commissioner are under the jurisdiction and control of the Secretary of Commerce and Labor. The statute creating this Bureau and the officers having charge of its business (section 6), provides as follows:

Bureau of Corporations — Its Officers.— That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Corporations, and a Commissioner of Corporations who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in said bureau a deputy commissioner who shall receive a salary of three thousand five hundred dollars per annum and who shall

in the absence of the Commissioner act as, and perform the duties of, the Commissioner of Corporations, and who shall also perform such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the said Commissioner. There shall also be in the said bureau a chief clerk and such special agents, clerks, and other employees as may be authorized by law. (Commerce and Labor Act of February 14, 1903, § 6.)

Power of Commissioner of Corporations.—The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to "An act to regulate Commerce," approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public. (Commerce and Labor Act of February 14, 1903, § 6.)

Powers Same as Powers of Interstate Commerce Commission.—In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock com-

panies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said "Act to regulate commerce" and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said "Act to regulate commerce" and by "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said "Act to regulate commerce," shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section. (Commerce and Labor Act of February 14, 1903, § 6.)

Publication of Information.— It shall also be the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law. (Statutes 1903, chap. 552, approved February 14, 1903, § 6.)

Purpose of the Statute.— Congress has no control of a corporation created under the laws of a State and engaged wholly in

domestic commerce. Congress has exclusive supervision of the business of interstate commerce when conducted by such a corporation in a manner to restrain trade or commerce among the States or with foreign nations. In many States corporations are not required to make reports which will disclose their financial condition. Many great industrial corporations transact business aggregating millions annually. They issue their capital stock upon which handsome dividends are sometimes paid. This stock is listed or offered in the open market, and investors are invited to buy. Often those who purchase such stocks for investment are obliged to rely entirely upon the business standing and commercial integrity of the directorate. A prudent investor seeks information as to the value of the assets and earning capacity of a corporation, upon which to base his judgment as to the value of the stock or securities offered.

In many instances, however, millions are invested in stocks of a corporation, the reason for the purchase being based altogether on the character of the men who control and manage its affairs. One who invests under such circumstances, in the language of the Street, puts his money into a "blind pool." There seems to be no adequate legal method of getting all the information a prudent investor requires under such circumstances, although in some States the laws require every corporation to furnish detailed statements and proper security which will safeguard the investors' interests. In many States, however, adequate safeguards are not provided and the information desired must be secured, if at all, through expensive and tedious litigation.

Many of the great combinations of capital and syndicated wealth engaged in commercial pursuits claim that secrecy is absolutely essential to success. That information which is open to the public is open to the competitor and business rival, and that unless a measure of secrecy is preserved success is difficult if not impossible.

The combinations of great industrial businesses operating in every State of the Union, and in every country in the world, may be so conducted by an alliance with the carriers to create a monopoly, destroy competition, enhance prices, and drive out of business rivals not absorbed by the trust. To remedy this phase of exclusive commercialism Congress passed the Sherman Act,

July 2, 1890, entitled "An Act *to protect* trade and commerce against unlawful restraints and monopolies." The cases in which the power of the Supreme Court of the United States has been invoked to restrain and dissolve these unlawful combinations are reported *ante* under the Sherman Act. The court has decreed a number of such combinations to be unlawful, has ordered their dissolution, and authorized the Circuit Courts of the United States to grant relief by mandatory injunction, prohibiting the unlawful acts complained of shown to be in violation of the statute.

Complaints have been made that the remedies provided by the act of Congress and applied by the courts are being constantly evaded; that injunctions do not seem to prohibit, although the letter of the law may be complied with. It is charged that the methods employed by powerful syndicates are such as to make it impossible to *get the evidence* necessary to secure the remedies which the law affords. The claim is made that the weapons of the trusts are the "boycott," the "black list," and the employment of the most potent of all weapons, an alliance with the great carriers to secure the granting of rebates which make competition with the trust extremely difficult if not impossible. That it is impossible to secure witnesses or get persons who have suffered damage to make complaints for fear that their business will be ruined or their means of livelihood taken away through the secret methods employed by those against whom redress is sought.

A court cannot act without evidence. A statute cannot be framed to remedy an evil unless all the facts surrounding the case are disclosed. The authorities, whether the courts or the Legislature, cannot act without reliable information.

The object of the act creating a department of commerce and labor was to create an official agency giving the government of the United States full power and authority to secure the information necessary, not only to protect the investor who has purchased the stock of a corporation, but to enable such action by the courts or by the Legislature as may be necessary to enforce the laws to "protect" commerce, or to frame such new legislation as may be proper to that end.

Diligent investigation is the object and aim of the statute affecting "*the organization, conduct, and management* of the

business of any corporation, joint stock company, or corporate combination," excepting only common carriers engaged in interstate commerce.

The powers conferred upon the Commissioner of Corporations in the performance of his duties under the act are identical with the powers conferred on the Interstate Commerce Commission under the Interstate Commerce Act, including the right to compel witnesses to testify and produce books and papers. The law giving a cabinet officer supervision over all corporations except common carriers with respect to interstate commerce is experimental. It has been suggested by the necessities and conditions arising from a monopoly of trade and commerce by vast aggregations of capital, whereby not only is competition practically destroyed, but thousands are deprived of the opportunity to engage in business or pursue their callings. In other words the great object of a republican form of government, based upon the fundamental principle of equality of opportunity, is in a measure defeated by the absolute denial of opportunity.

Necessity of Means to Secure Evidence.—The importance of this new law giving a department of the government power to investigate, and affording the means of securing reliable information is illustrated by the action of the *United States v. Swift*, 122 Fed. Rep. *ante*, page 286, known as the beef trust. The injunction issued in that case by Judge GROSSCUP, *ante*, page 289, it was supposed would be adequate to secure the relief sought and open the markets to the stockraisers and grain growers of the West. The result has shown that conditions remain about as they were before the injunction was issued. How is it that the mandatory order of a United States court seems apparently ineffectual? It is believed that the diligent investigation which the Commissioner of Corporations is required to make may furnish an answer to the inquiry. Such investigation has been made, and is being made, and the results are expected to be laid before Congress at its next session.

Market Price of Beef.—The unreliable character of the information as to the cause of fluctuation in the price of meat and live stock, gathered from officers of the constituent companies in the trust, is illustrated, by inter-

views recently secured by representatives of the New York HERALD, which instituted a very thorough investigation of the subject. That enterprising journal published such information as it was able to obtain from representatives of the packers with regard to the inquiry as to how it happened that the cattle raiser receive such insignificant prices for his stock, while the consumer was compelled to pay so much. In answer to these inquiries the HERALD of July 3, 1904, says:

J. Ogden Armour, head of the corporation of Armour & Co., was asked this question recently. His answer was:

"The high price of beef is due to the fact that the live stock production of the United States has not kept pace with the increase in the population."

Louis Swift, president of Swift & Co., was asked why it is that the cattle growers of South Dakota, Montana, Iowa, Nebraska, Kansas, and Texas receive hardly enough for their cattle to pay for the corn fed while fattening them. His answer was:

"The high prices paid for cattle in 1902 persuaded many farmers to load up with a lot of fatteners. The ranges were filled and the result was overproduction. The supply is greater than the demand, and in consequence the price of beef on the hoof has fallen."

Another explanation is that offered by an employee of the International Packing Company, one of the few independents still remaining in the field. The International has been in the hands of a receiver and it is well understood that when its affairs are finally settled it will be absorbed by the trust. For that reason those connected with the concern refuse to permit the use of their names. One of those seen by a reporter for the HERALD said:

"The reason why the prices of cattle are low and the prices of dressed meats are high is that competition has been stifled by the beef trust. Arbitrary prices are made both ways. The cattle raiser, the retail butcher, and the consumer are all at the mercy of the trust. The machinery of the beef trust is perfect. A 'gentlemen's agreement' has taken the place of the written contracts that existed two years ago. It matters little to the cattle grower whether he receives one bid for his beeves or four bids, so long as only one price is quoted to him.

"The beef trust has the cattle grower at its mercy. It controls the stock yards at Kansas City, St. Joseph, St. Louis, Omaha, Sioux City, St. Paul, Chicago, Fort Worth, and the various smaller cities of the country. The beef trust controls the facilities for shipping, and it has, by the creation of the National

Packing Company, taken from the field all of the independent concerns. Mr. Armour was wrong when he said that the reason why beef is high is that the live stock production has not kept pace with the increase in population. Mr. Swift was wrong when he said that the reason why the prices paid for cattle are low is because there has been an overproduction. The lack of competition is the true reason."

As yet there has been no judicial interpretation defining the limitation of the powers and authority conferred on the Commissioner of Corporations, and to what extent this power may be constitutionally exercised. It may be observed, however, that the power is not broad enough to compel corporations doing an interstate business to make public statements of their affairs to enable investors to be sufficiently advised before purchasing corporate stock, as to the assets and resources which would indicate the value of the stock secured by such assets.

Other Provisions of the Act Creating Bureau of Corporations.

--- The first part of the statute (Laws 1903, chap. 552), entitled "An Act to establish the Department of Commerce and Labor" which creates the Bureau of Corporations and a Commissioner of Corporations, and places them under the supervision and control of a Cabinet officer, namely the Secretary of Commerce and Labor, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there shall be at the seat of government an executive department to be known as the Department of Commerce and Labor, and a Secretary of Commerce and Labor, who shall be the head thereof, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall receive a salary of eight thousand dollars per annum, and whose term and tenure of office shall be like that of the heads of the other Executive Departments; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such Department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said Department. The said Secretary shall cause a seal of office to be made for the said Department of such device as the President shall approve, and judicial notice shall be taken of the said seal.

SEC. 2. Assistant Secretary of Commerce.— That there shall be in said Department an Assistant Secretary of Commerce and

Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk and such other clerical assistants as may from time to time be authorized by Congress; and the Auditor for the State and other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Commerce and Labor, and of all bureaus and offices under his direction, all accounts relating to the Light-House Board, Steamboat-Inspection Service, Immigration, Navigation, Alaskan fur-seal fisheries, the National Bureau of Standards, Coast and Geodetic Survey, Census, Department of Labor, Fish Commission and to all other business within the jurisdiction of the Department of Commerce and Labor, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of Commerce and Labor.

SEC. 3. Duty of Department.— That it shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, the labor interests, and the transportation facilities of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law. All unexpended appropriations, which shall be available at the time when this act takes effect, in relation to the various offices, bureaus, divisions, and other branches of the public service, which shall, by this Act, be transferred to or included in the Department of Commerce and Labor, or which may hereafter, in accordance with the provisions of this Act, be so transferred, shall become available, from the time of such transfer, for expenditure in and by the Department of Commerce and Labor and shall be treated the same as though said branches of the public service had been directly named in the laws making said appropriations as parts of the Department of Commerce and Labor, under the direction of the Secretary of said Department.

SEC. 4. Officers, Bureaus, and Divisions.— That the following-named offices, bureaus, divisions, and branches of the public service, now and heretofore under the jurisdiction of the Department of the Treasury, and all that pertains to the same, known as the Light-House Board, the Light-House Establishment, the Steamboat-Inspection Service, the Bureau of Navigation, the United States Shipping Commissioners, the National Bureau of Standards, the Coast and Geodetic Survey, the Commissioner-

General of Immigration, the commissioners of immigration, the Bureau of Immigration, the immigration service at large, and the Bureau of Statistics, be, and the same hereby are, transferred from the Department of the Treasury to the Department of Commerce and Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named Department; and that the Census Office, and all that pertains to the same, be, and the same hereby is, transferred from the Department of the Interior to the Department of Commerce and Labor, to remain henceforth under the jurisdiction of the latter; that the Department of Labor, the Fish Commission, and the Office of Commissioner of Fish and Fisheries, and all that pertains to the same, be, and the same hereby are, placed under the jurisdiction and made a part of the Department of Commerce and Labor; that the Bureau of Foreign Commerce, now in the Department of State, be, and the same hereby is, transferred to the Department of Commerce and Labor and consolidated with and made a part of the Bureau of Statistics, hereinbefore transferred from the Department of the Treasury to the Department of Commerce and Labor, and the two shall constitute one bureau, to be called the Bureau of Statistics, with a chief of the bureau; and that the Secretary of Commerce and Labor shall have control of the work of gathering and distributing statistical information naturally relating to the subjects confided to his Department; and the Secretary of Commerce and Labor is hereby given the power and authority to rearrange the statistical work of the bureaus and offices confided to said Department, and to consolidate any of the statistical bureaus and offices transferred to said Department; and said Secretary shall also have authority to call upon other Departments of the Government for statistical data and results obtained by them; and said Secretary of Commerce and Labor may collate, arrange, and publish such statistical information so obtained in such manner as to him may seem wise.

That the official records and papers now on file in and pertaining exclusively to the business of any bureau, office, department, or branch of the public service in this Act transferred to the Department of Commerce and Labor, together with the furniture now in use in such bureau, office, department, or branch of the public service, shall be, and hereby are, transferred to the Department of Commerce and Labor.

SEC. 5. Bureau of Manufactures.—That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Manufactures, and a chief of said bureau, who shall be appointed by the President, and who shall receive a salary of four thousand dollars per annum. There shall also be in said

bureau, such clerical assistants as may from time to time be authorized by Congress. It shall be the province and duty of said bureau, under the direction of the Secretary, to foster, promote, and develop the various manufacturing industries of the United States, and markets for the same at home and abroad. domestic and foreign, by gathering, compiling, publishing, and supplying all available and useful information concerning such industries and such markets, and by such other methods and means as may be prescribed by the Secretary or provided by law. And all consular officers of the United States, including consuls-general, consuls, and commercial agents, are hereby required, and it is made a part of their duty, under the direction of the Secretary of State, to gather and compile, from time to time, useful and material information and statistics in respect to the subjects enumerated in section three of this Act in the countries and places to which such consular officers are accredited, and to send, under the direction of the Secretary of State, reports as often as required by the Secretary of Commerce and Labor of the information and statistics thus gathered and compiled, such reports to be transmitted through the State Department to the Secretary of the Department of Commerce and Labor.

CHAPTER V.

TELEGRAPH COMPANIES.

Act in Aid of Railroad and Telegraph Lines, entitled "An Act Supplementary to the Act of July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line From the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes,' and also the Act of July 2, 1864, and Other Acts Amendatory of Said First Named Act." Approved August 7, 1888.

ANALYSIS OF STATUTE.

- SEC. 1. Railroad company alone must operate telegraph over its line by its own corporate officers.
2. Any telegraph company may connect with existing lines — Equal facilities compulsory.
 3. Interstate Commerce Commission may enforce statute — May secure writ of *mandamus*.
 4. Attorney-General shall enforce rights of government — May annul unlawful contracts.
 5. Violation of the statute a misdemeanor — Party aggrieved may sue for damages.
 6. Contracts to be filed with Interstate Commerce Commission — Annual Reports — Penalties.
 7. Right to amend act reserved.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

§ 1. Railroad must Operate Telegraph by Its Own Officers.
— That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incor-

porating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain, and operate, for railroad, Governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid. (*Laws 1888, chap. 772, approved August 7, 1888.*)

Act of July 1, 1862, etc.—The provisions of the act of August 7, 1888, is supplementary to prior legislation on the subject. This legislation, as recited in the title of the act of August 7, 1888, is now embraced in Title LXV of the United States Revised Statutes, sections 5263–5269, inclusive. These provisions, together with the act of 1888, embrace the legislation governing telegraphs. The provisions of the United States Revised Statutes are as follows:

SEC. 5263. Public Domain Open to any Company.—Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

SEC. 5264. Right to Take Timber and Land.—Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their

lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 5265. Rights not Transferrable.— The rights and privileges granted under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this Title, shall not be transferred by any company acting thereunder to any other corporation, association, or person.

SEC. 5266. Government Messages.— Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

SEC. 5267. Government may Purchase Lines.— The United States may, for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 5268. Company must File Acceptance.— Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law.

SEC. 5269. Penalties.— Whenever any telegraph company, after having filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or by this Title, shall, by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this Title, or

by the provisions of section two hundred and twenty-one, Title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than one hundred dollars and not more than one thousand dollars for each such refusal or neglect. (To be recovered by an action or actions at law in any District Court of the United States.)

Telegraph Controlled by Congress.— A State has no power to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence over territory within its own jurisdiction. A State law cannot confer exclusive rights upon a telegraph company, or create a telegraph monopoly. Congress has exclusive control over the telegraph, where it affects communication from a point in one State to points in another, because such transmission of intelligence is an essential agency of interstate commerce, and Congress having legislated on the subject, all State laws in conflict with an act of Congress are void. *Pensacola Tel. Co. v. Western Union Tel. Co.* (October, 1877), 96 U. S. 1.

"The electric telegraph," says Chief Justice WAITE in the case cited, "marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions.

"Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new devel-

opments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation.

“In fact, from the beginning it seems to have been assumed that Congress might aid in developing the system, for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago (opinion written October, 1877), with money appropriated by Congress for that purpose (5 Stat. 618), and large donations of land and money have since been made to aid in the construction of other lines.” *Ib.*

State Cannot Create Telegraph Monopoly.—The case cited involved the right of the State of Florida to grant to a telegraph company the exclusive right to operate within the State. The plaintiff below, the Pensacola Telegraph Company, had an exclusive grant from the Florida Legislature to operate telegraph lines in counties of Escambia and Santa Rosa in that State. These counties lay between the southern boundary of Alabama and the northern coast of the Gulf of Mexico. Pensacola was a seaport in Santa Rosa county, on the Gulf coast, on the Bay of Pensacola.

The defendant, the Western Union Telegraph Company, was incorporated under the laws of New York. It had complied with the act of Congress of July 24, 1866,* authorizing telegraph companies organized under the laws of any state, on complying with the terms of the act, to operate lines of telegraph “over any portion of the public domain” over and along any military or post

* The act of July 24, 1866, is now embraced in title 65 of the United States Revised Statutes, §§ 5263–5269. For the text of these sections see *ante*, pages 319–321.

road of the United States, or over, under, or across navigable streams or waters of the United States. In addition to this authority conferred by the act of Congress, the Western Union company secured also from the Pensacola and Louisville railroad the right to erect a telegraph line on its right of way from the Bay of Pensacola to the State of Alabama, thence connecting with other lines. The defendant on receiving such rights and authority from the railroad company, and in conformity also with the provisions of the act of July 24, 1866, commenced to erect a telegraph line from the city of Pensacola north through Santa Rosa county, in which territory plaintiff claimed an exclusive right to operate telegraph lines under the Florida statute. On July 27, 1874, plaintiff filed a bill in the Circuit Court of the United States for the northern district of Florida, praying for an injunction perpetual to restrain the defendant from building or operating its line within the territory within which plaintiff claimed exclusive rights, and from which the Legislature of Florida sought to exclude all others. Upon the pleading and evidence the Circuit Court dismissed the bill, holding that defendant having complied with the act of Congress which authorized it to build its line in the territory claimed by plaintiff, the Florida statute giving to plaintiff an exclusive grant over the territory, was void, as in conflict with the Federal statute, the subject-matter of which related to interstate commerce.

On appeal the Supreme Court of the United States affirmed the decree, holding that there was no power in the Florida Legislature to make an exclusive grant to plaintiff of the right to operate a telegraph line upon or over territory within the State, since Congress had legislated on the subject and the Florida statute conflicted and was repugnant to the act of Congress. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

"The government of the United States," said the chief justice, "within the scope of its powers operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by States lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all." *Ib.*

A Telegraph Company Is a Carrier.—A telegraph company occupies the same relation to commerce as a carrier of messages

that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits. *Telegraph Co. v. Texas*, 105 U. S. 460.

Taxation by State of Telegraph Company.— Messages sent by a telegraph company out of the State is a tax on interstate commerce, and a statute of a State imposing such tax is unconstitutional and void. *Telegraph Co. v. Texas*, 105 U. S. 460.

The Constitution of Texas authorized its Legislature to "impose occupation taxes, both upon natural persons and upon corporations other than municipal doing business in the State. A Texas statute (Art. 4655, Rev. Stat.) declared that every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full-rate message sent, and one-half of one cent for every message less than full rate. Under this act the Western Union Telegraph Company between October 1, 1879, and July 1, 1880, was taxed on 169,076 full rate, and on 100,408 less than full rate messages. A large portion of these were sent out of the State. Some messages were sent by government officers on public business. The company refused to pay the tax and was sued in the State court and judgment was recovered against it on the ground that the Texas statute was valid. This judgment was sustained by the Supreme Court of Texas. On writ of error to the Supreme Court of the United States the judgment was reversed as to messages sent out of the State and as to government messages, on the ground that the statute of Texas, in assuming to tax such messages, was without power, and its statute was void. *Ib.*

Chief Justice WAITE, in his opinion, observed that "if a tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such so far as it operates on private messages sent out of the State it is a regulation on foreign and interstate commerce and beyond the power of the State. As to the government

messages it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers. *McCullough v. Maryland* (4 Wheat. 316), and therefore void." *Ib.*

See also to same effect *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

State Law as to Messages Operates only within the State.—

The manner in which a telegraph company conducts its business in different States cannot be governed by a State statute. A State law as to mode of delivering messages cannot operate as to a breach of its provisions in another State, and its provisions cannot be enforced except for violations in the State in which the law was enacted. *Western Union Tel. Co. v. Pendleton* (May, 1887), 122 U. S. 347; *Western Union Tel. Co. v. James* (May, 1896), 162 U. S. 650.

In the *Pendleton* case the court was required to construe a statute of the State of Indiana which required telegraph companies to deliver dispatches, by messenger, to the persons to whom they are addressed or to their agents if they reside within one mile of the telegraph station or within the city or town in which the station is. Such a statute cannot operate without the State, as it would constitute a regulation with regard to interstate commerce which the State has no power to make.

William Pendleton, the plaintiff, sent a telegram from Shelbyville, Ind., to Ottumwa, Iowa, on April 14, 1883. The message was sent at thirty-five minutes past 5 in the afternoon. The defendant received the message at Ottumwa at 7:30 P. M. James Harker, in whose care the message was sent, lived more than a mile from the telegraph station in Ottumwa. Defendant, as was its custom, if the person addressed lived more than a mile from the station, put the message in the post-office in Ottumwa and it was delivered to the sendee next morning by the postmaster at about 9 A. M. The Indiana statute (§ 4176, Rev. Stat. Ind. 1881) required every telegraph company to deliver messages "with impartiality and in good faith, and in the order of time in which they are received," under penalty of \$100 for failure to transmit, or if delayed or postponed.

Plaintiff claimed to have suffered damage by the delay of the message, and sued defendant under the Indiana statute for fail-

ure to deliver the message in the sum of \$100 in the State court of Indiana. Defendant's answer set forth the duties and liabilities of defendant in the State of Iowa, which required it to transmit messages without unusual delay, and willful failure to deliver was declared a misdemeanor. On demurrer to the answer plaintiff had judgment for \$100, which was affirmed by the Supreme Court of Indiana. On writ of error to the Supreme Court of the United States the judgment was reversed on the ground that the Indiana statute, in so far as it attempted to regulate the mode in which messages sent in Indiana, should be delivered in other States, was void, as its operation affected a regulation of interstate commerce. *Western Union Tel. Co. v. Pendleton* (May, 1887), 122 U. S. 347.

State Law; when Operative within the State.— A State has power to pass a law requiring a telegraph company to promptly transmit and deliver messages within the State, under a penalty of \$100. Such a statute is valid only within the State, and can be enforced within the State as a valid exercise of its police power.

The Legislature of Georgia passed a law requiring a telegraph company during usual office hours to receive all dispatches, and on payment of usual charges to "transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of \$100" to be recovered by suit in any court having jurisdiction. That statute further declared that the act should not be construed so as to impair right of party to recover damages for breach of contract or duty by any telegraph company, which damages might be recovered in the same suit.

Plaintiff, a cotton merchant living at Blakely, Ga., on November 4, 1890, wired Tullis & Co. at Eufaula, Ala., offering to sell cotton on terms named in the message. Tullis received the message the same day, and sent a telegram to Blakely accepting his offer. This message was received by defendant at Blakely late in the evening of November 4th. Defendant did not deliver it till the next morning, November 5th. Plaintiff claimed that the message was not delivered by defendant with due diligence and that as a result of the delay he suffered damage. He sued defendant in the State court of Georgia under the Georgia statute for the \$100 penalty and also for \$242.60 damages. At

the trial plaintiff recovered both the penalty and the damages. On appeal to the Supreme Court of Georgia the judgment was sustained as to the penalty, but reversed as to the damages, and plaintiff having remitted the claim for damages the judgment as to the penalty of \$100 under the statute was affirmed.

A writ of error was sued out by defendant to the Supreme Court of the United States where the judgment was affirmed and the Georgia statute upheld as a valid exercise of the police power of the State. *Western Union Tel. Co. v. James* (May, 1896), 162 U. S. 650.

Mr. Justice PECKHAM distinguished the *Pendleton* case (122 U. S. 347). He observed that in the case cited, the State court sought to enforce an Indiana statute outside and beyond the territorial limits of the State. "That statute," says Mr. Justice PECKHAM, referring to the Indiana law, "was held to conflict with the clause of the Constitution of the United States which vests in Congress power to regulate commerce among the States in so far as it attempted to regulate the delivery of such dispatches to places situate in other States, and it was said that the reserved police power of the State, under the Constitution, although difficult to define, did not extend to the regulation of the delivery at points without the State of telegraphic messages received within the State." *Ib.*

The Georgia Statute Construed.—In construing the Georgia statute, as to the question of the penalty and the damages imposed, Mr. Justice PECKHAM said:

"It is true it provides a penalty for a violation of its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any State law on this subject would be valid, even in the absence of congressional legislation, if the penalty provided was so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legisla-

tion. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact. * * *

“Again it is said that this company entered into a valid contract in Alabama with the sender of the message, which provided that it would not be liable for mistakes in its transmission beyond the sura received for sending the message, unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the liability of the company as it would otherwise exist. The message was not repeated. This kind of a contract, it is said, was a reasonable one, and has been so held by this court. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1. This, however, is not an action by the person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was. There was no mistake in the transmission of the message, and there was no breach of the agreement. The action here is not founded upon any agreement and the judgment neither affects nor violates the contract mentioned. Nor are we here concerned with the provisions of the third section of the act relating to the damages to be recovered in the case of cipher messages. This was not such a message, and this judgment is solely based upon the penalty granted by the statute for non-delivery, and could be sustained even if the third section of the act were not valid, which is a question we do not decide nor express any opinion concerning it. The residue of the act could stand without the third section.” *Id.*

Text of the Georgia Statute.—The Georgia statute, the validity of which was upheld in the case cited, is entitled: “An Act to prescribe the duty of electric telegraph companies as to receiving and transmitting despatches, to prescribe penalties for violations thereof, and for other purposes.” The text of the statute is as follows:

Messages to be Delivered with Diligence.—“Sec. 1. Be it enacted by the general assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires,

wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue: *Provided*, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

One-Mile Clause.—"Sec. 2. Be it further enacted, that such companies shall deliver all dispatches to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same. *Provided*, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is.

Cipher Messages.—"Sec. 3. Be it further enacted, that in all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.*

Repealer.—"Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed."

§ 2. Any Telegraph Company may Connect with Existing Lines.— That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its lines shall have the right and said railroad or telegraph company [**Equal Facilities Compulsory**] shall allow the line of said telegraph com-

* The Supreme Court in the *James* case did not construe section 3 of the Georgia statute, and declared expressly that it purposely refrained from expressing any opinion as that section.

pany so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

§ 3. Interstate Commerce Commission may Enforce Statute.

— That if any such railroad or telegraph company referred to in the first section of this act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain, and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or tele-

graph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same [**May Secure Writ of Mandamus**] by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: *Provided*, That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

§ 4. Attorney-General shall Enforce Rights of Government.

— That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, [**May Annul Unlawful Con-**

tracts] and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

§ 5. **Violation of Statute a Misdemeanor.**— That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this act and by the acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the Government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six months; and in every such case of refusal or failure [**Party Aggrieved may Sue for Damages**] the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be

guilty thereof, in the circuit or district court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

§ 6. **Contracts to be Filed with Interstate Commerce Commission.**— That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies [Annual Reports] annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its

relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal [Penalties] shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

§ 7. **Right to Amend Acts Reserved.**— That nothing in this act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster-General now has under title sixty-five of the Revised Statutes to fix rates, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.

CHAPTER VI.

SAFETY APPLIANCE LAW.

Act to Promote Safety of Employees and Traveling Public.

ENTITLED

"An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."— Approved March 2, 1893.

ANALYSIS OF STATUTE.

- SEC. 1.** Equipment includes power, driving-wheels and air-brakes.
2. Automatic couplers coupling automatically by impact.
 3. Carrier may refuse unequipped cars from other lines.
 4. Grab-irons and hand-holds required.
 5. Draw-bars for freight cars — Standard height prescribed.
 6. Penalties; how recovered.
 7. Extension of time for compliance with act; how granted.
 8. Employee, when not deemed guilty of negligence.
1. Safety Appliance Law extended by act of March 2, 1903.
 2. Power of Interstate Commerce Commission — Penalties.
 3. Application of act of 1893.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

§ 1. **Power Driving-Wheels — Train Brakes.**— That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-

wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

§ 2. Automatic Couplers.— That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

§ 3. Carrier may Refuse Unequipped Cars.— That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

§ 4. Grab Irons and Handholds.— That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in

the ends and sides of each car for greater security to men in coupling and uncoupling cars.

§ 5. Drawbars — Standard Height Prescribed.— That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

NOTE.— Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

§ 6. Penalties, how Recovered.— That any such common carrier using any locomotive engine, running any

train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred: and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended by Act approved April 1, 1896.)

§ 7. **Extension of Time.**— That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

§ 8. **Employee, when not Deemed Negligent.**— That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary

to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Supplemental Act of March 2, 1903.— The provisions of the Safety Appliance Law of 1893 were supplemented by an Act approved March 2, 1903, so as to extend its provisions to the Territories and the District of Columbia. The supplemental Act is entitled "An Act to amend an act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six." The provisions of the Act of 1903 are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

§ 1. **Act Extended to Territories, and District of Columbia.**

— That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of

the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

§ 2. Power of Interstate Commerce Commission — Penalties.— That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

§ 3. Application of Act of 1893.— That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

**RULES OF PRACTICE BEFORE THE COMMISSION IN
CASES AND PROCEEDINGS UNDER THE ACT
TO REGULATE COMMERCE.**

I.

Public Sessions.

The general sessions of the Commission for hearing contested cases will be held at its office in the Sun Building, No. 1317 F street NW., Washington, D. C., on such days and at such hour as the Commission may designate.

When special sessions are held at other places, such regulations as may be necessary will be made by the Commission.

Sessions for receiving, considering, and acting upon petitions, applications, and other communications, and also for considering and acting upon any business of the Commission other than the hearing of contested cases, will be held at its said office at 11 o'clock a. m. daily when the Commission is in Washington.

II.

Parties to Cases.

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers subject to the provisions of said act. Where a complaint relates to the rates or practices of a single carrier, no other carrier need be made a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

Where a complaint relates to rates or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall

set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person, not a carrier, who intervenes in behalf of the defense, shall have the right to file an answer or otherwise become a party, except to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel on the argument of the case.

III.

Complaints.

Complaints of unlawful acts or practices by any common carrier, made in pursuance of section 13 of the act to regulate commerce, must be by petition, setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The complainant must furnish as many copies of the petition as there may be parties complained against to be served.

The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served, personally or by mail in its discretion, upon each carrier complained against.

IV.

Answers.

A carrier complained against must answer within twenty days from the date of the notice above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by special order of the Commission. The original answer must be filed with the Secretary of the Commission at its office in Washington, and a copy thereof at the same time served, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a carrier complained against shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment

must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the carrier.

V.

Notice in Nature of Demurrer.

A carrier complained against who deems the petition insufficient to show a breach of legal duty, may, instead of answering, or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the Secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

VI.

Service of Papers.

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail; and when any party has appeared by attorney, service upon such attorney shall be deemed proper service upon the party.

VII.

Affidavits.

Affidavits to any pleading or application may be made before any officer of the United States, or of any State or Territory, authorized to administer oaths.

VIII.

Amendments.

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the Commission in its discretion.

IX.

Adjournments and Extensions of Time.

Adjournments and extensions of time may be granted upon the application of any party in the discretion of the Commission.

X.

Stipulations.

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the Secretary,

agree upon the facts, or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

XI.

Hearings.

Upon issue being joined by the service of an answer or notice of hearing on the petition, the Commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the carrier complained against admits the same or fails to answer the petition. The carrier must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases shall be argued orally upon submission of the testimony, unless a different time shall be agreed upon by the parties or directed by the Commission, but oral argument may be omitted in the discretion of the Commission.

XII.

Depositions.

The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission, and at any time after the same is at issue. The Commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or otherwise interested in the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state

the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the Secretary.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the Commission on its own motion, reasonable notice thereof in writing must be given by such carrier to the Commission itself, or to such person as may have been previously designated by the Commission to be served with such notice.

Every person whose deposition is taken shall be cautioned and sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Secretary. All depositions must be promptly filed with the Secretary.

XIII.

Witnesses and Subpoenas.

Subpoenas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or by deposition before a magistrate authorized to take the same, will, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission.

Subpoenas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also, by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.*

XIV.

Proposed Findings and Briefs.

Proposed findings embracing the material facts claimed to be established by the evidence, and referring to the particular part of the record relied upon to support each finding proposed, shall be filed by each party. Printed or written arguments or briefs may be filed by any party. A copy of the proposed findings, brief, or argument filed on behalf of any party, must at the same time be served upon the adverse party or parties, personally or by mail, and notice of such service thereupon filed with the Secretary of the Commission. The time within which proposed findings and printed or written arguments or briefs shall be filed in any case will be determined by the Commission upon submission of the testimony.

XV.

Rehearings.

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a re-hearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any recommendation, decision, or order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such recommendation, decision, or order which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth. Such petition must be duly verified, and a copy

* Fees of witnesses are fixed by law at \$1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.

thereof, with notice of the time and place when the application will be made, must be served upon the adverse party at least ten days before the time named in such notice.

XVI.

Printing of Pleadings, etc.

Pleadings, depositions, briefs, and other papers of importance, shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

XVII.

Copies of Papers or Testimony.

Copies of any petition, complaint, or answer in any matter or proceeding before the Commission, or of any order, decision, or opinion by the Commission, will be furnished without charge, upon application to the Secretary by any person or carrier party to the proceeding.

One copy of the testimony will be furnished by the Commission for the use of the complainant, and one copy for the use of the defendant, without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

XVIII.

Compliance with Orders against Carriers.

Upon the issuance of an order against any carrier or carriers, after hearing, investigation, and report by the Commission, such carrier or carriers must promptly, upon compliance with its requirements, notify the Secretary that action has been taken in conformity with the order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

XIX.

Applications by Carriers under Proviso Clause of Fourth Section.

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by verified petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the peti-

tioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

XX.

Information to Parties.

The Secretary of the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a full presentation of facts material to the controversy.

XXI.

Address of the Commission.

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the Commission, must be addressed to Washington, D. C., unless otherwise specially directed.

FORMS.

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

No. 1.

Complaint against a Single Carrier.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ——— RAILROAD COMPANY. }

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of ——— and points in the State of ———, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

III. That (*here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III*).

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. (*The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*)

Dated at ———, ———, 190—.

A. B.

(*Complainant's signature.*)

No. 2.

Complaint against Two or More Carriers.

INTERSTATE COMMERCE COMMISSION.

A. B.
against

THE ——— RAILROAD COMPANY,
AND
THE ——— RAILROAD COMPANY. }

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in the transportation of passengers and property, by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of ——— and points in the State of ———, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

(*Then proceed as in Form 1.*)

No. 3.

Answer.

INTERSTATE COMMERCE COMMISSION.

A. B.
against

THE ——— RAILROAD COMPANY. }

The above-named defendant, for answer to the complaint in this proceeding, respectfully states —

I. That (*here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph*).

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ——— RAILROAD COMPANY.

By E. F.,

(*Title of officer.*)

No. 4.

Notice of Hearing by Carrier under Rule V.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
 THE ——— RAILROAD COMPANY. }

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE ——— RAILROAD COMPANY.

By E. F.,
 (Title of officer.)

No. 5.

Subpoena Duces Tecum.

To ———, ———,
 ———, ———.

You are hereby required to appear before ——— in the matter of a complaint of ——— against ———, as a witness on the part of ———, on the ——— day of ———, 190—, at ——— o'clock —. m. at ———, and bring with you then and there ———. [*Here designate the books, papers, contracts, or documents desired to be produced.*]

Dated ———.

(Seal.)

———, ———,
 Commissioner.

———, ———,
 Attorney for ———.

(NOTICE.— Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.)

No. 6.

Notice of Taking Depositions under Rule XII.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ——— RAILROAD COMPANY. }

You are hereby notified that G. H. will be examined before C. D., a ——— (*title of officer or magistrate*), at ———, on the ——— day of ———, 190—, at ——— o'clock in the ———noon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the rules of practice of the Interstate Commerce Commission; at which time and place you are notified to be present and take part in the examination of the said witness.

Dated ——— ———, 190—.

I. J.

(*Signature of complainant or defendant, or of counsel.*)

(To A. B., the above-named complainant (*or The ——— Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant.*)

INDEX.

	PAGE.
Abatement and Revival of suit under Commerce Act.....	150, 151
Action, revival of, under Commerce Act	150
under Commerce Act not removable from State court.....	164
when remanded to State court	166
affecting title to land, removable	167
Acts of Congress cited and referred to.	
of March 3, 1875 (Removal Act)	165
of August 13, 1888 (Removal Act)	165
of February 11, 1893 (as to Testimony)	188
of March 9, 1892 (Depositions)	208
of February 11, 1903 (Expedition Act)	219
creating Bureau of Corporations, scope of	309
See also titles of various acts.	
Accounts, system of, by carrier, must be uniform.....	229
Accidents, carrier must make monthly reports of (Act of March 3,	
1901)	229
penalty for failure to report	230
Advantages and preferences forbidden	69
Advance Payments, when exacted from connecting carriers.....	84
Adamson, Congressman, proposed bill giving power to fix rates....	193
Addystone Pipe Case, report of	267 <i>et seq.</i>
Advance in Prices, how manipulated by trust.....	271
Agents, taxation of	27, 28
Agreement to prevent continuous carriage forbidden.....	145
Air Brakes. See SAFETY APPLIANCES.	
Alternative remedy of shipper in the	152

	PAGE.
Allotments of cars under mandamus, basis of	244
Amendment to alternative writ of mandamus authorized	243
Any Person may invoke provisions of Commerce Act.....	211
Anti-trust Laws of State, when cannot be invoked collaterally...	294
See also TRUSTS.	
Appellate Jurisdiction of Federal courts	155, 171
See also JURISDICTION.	
Appeal, jurisdiction not ousted by acts pending	157
none from order remanding cause	166
directly to Supreme Court, Act of February 11, 1903.....	171
from District Court of the United States.....	172
from Circuit Courts of United States	172, 173
from interlocutory judgments	173
to Supreme Court under section 16	216, 218
direct to Supreme Court, under Act of February 11, 1903. 219, 220	
to Supreme Court prior to Act of 1891	222
See also WRIT OF ERROR.	
Attorney-General may request district attorney to prosecute under	
Elkins Act	136
may enforce provisions of telegraph acts.....	331
Attachment, power of court to issue, under Sec. 16.....	216
Auditor appointed by trust, duties of	271
Automatic Couplers, carrier must use	335, 336
Beef Trust declared illegal	284
pleadings in case	286
text of injunction in	289
mode of securing evidence as to	312
Boycott in violation of injunction punishable as contempt.....	170
treble damages for, under Sherman Act.....	299
Books must be produced in evidence	199
Bonuses, how divided by trust	268
Bridges, use of interstate commerce	40
Breaking Bulk, carrier forbidden to, to prevent continuous carriage. 145	
Breazeale, Congressman, proposed bill giving power to fix rates...	193
Brewer, Hon. David J., concurring opinion in Merger case.....	279

	PAGE.
Brakes, carrier must use safety brakes.....	335, 336
Bureau of Corporations, Act Creating (Laws 1903, chap. 552).	
text of Sec. 1.....	314
text of Sec. 2.....	314, 315
text of Sec. 3.....	315
text of Sec. 4.....	315, 316
text of Sec. 5.....	316, 317
text of Sec. 6.....	307-309
created by Act of 1903	307
scope and purpose of	309
other provisions of act creating	314
Bureau of Manufactures, created under Act of 1903.....	316
Burden of Proof, findings of commission are <i>prima facie</i> evidence..	213
By-Laws of the iron pipe trust.....	270
of tile trust	273, 300
Carriers, common-law rule as to.....	36
remedy by injunction against State railroad commission.....	45
liable at common law for excessive charges.....	60
liable for under State statutes	61
duty of, to connecting lines	69
enjoined from discriminating against locality.....	
conflict of authority as to discrimination against.....	79-84
when may sue connecting carrier for treble damages.....	85
making through rates, when liable	89
engaged in ocean competition, long and short-haul clause as to	106-116
excessive charges by, not justified to enable him to pay ex- penses	116
mode of fixing rates by, long and short-haul clause.....	119
need not apply to commission to fix rates	120
must publish rates	128
must file contracts with commission	130
act of officer or agent of, forbidden	134
forbidden to prevent continuous carriage over connecting lines.	145
liability of, under Sec. 8, Commerce Act.....	146
criminal liability of	174
compliance by, with order, effect of	213
disobedience of, how punished	214
breach by one, jurisdiction over all	222
must report to interstate commerce commission	228
must file contracts as to 5,000-mile tickets	233
may have mandamus against connecting carrier	239
cannot prohibit shipper from designating route.....	245

Carriers — Continued.	PAGE.
governed by Sherman Act	291
telegraph company is	323
must use safety appliances	335, 336
must use grabirons and handholds	336
may refuse unequipped cars	336
Cartage, when terminal charge	64
when not a terminal charge	118
Cars, carrier forbidden to change, to prevent continuous carriage...	145
shipper may secure mandamus to compel cars to be furnished..	237
prorating of, compelled by mandamus	242
basis of allotment of, under mandamus	244
Cattle Trust, cases of	265
Charges, all charges must be reasonable	33
greater for longer than shorter haul forbidden.....	89
for "switching," State may regulate	171
Citizenship, diversity of, not essential to confer jurisdiction.....	153
of national bank under Removal Act.....	168
Circuit Court of United States, jurisdiction of	154
Circuit Court of Appeals, appeals and writs of error to.....	172, 173
Coal Trust, contracts of, must be produced	126
declared illegal	290
Coal Contracts, relevant under Commerce Act	200, 202
Commerce, Congress may regulate interstate	3
taxation of	26
power of Congress to "regulate"	37
defined	39
interstate and domestic	39
eminent domain, bridges	40
assistant secretary of, created	314
Common Carriers governed by Sherman Act	291
See also CARRIERS.	
"Common Control" defined	41
Common Law, carrier liable under, for excessive charge	60
remedy when not superseded by statute	62
Common-law Rule as to rights of carriers	36

	PAGE.
Congress, power over interstate commerce.....	1, 2
power of, when supreme	3
power of, and of the States	42
interstate commerce commission must report to	231
power of, under Sherman Act	252
controls the telegraph	321
supreme as to interstate commerce	3
consent of, to State laws, game, liquor	6, 7
under Lacey Act	6
under Wilson Act	10
Constitutionality of Sherman Act	249, 250
Constitutional Provisions as to personal and private rights.....	1
text of	3, 4
Connecting Lines, duty of carriers as to.....	69
liability of carriers for through rates over.....	89
long and short-haul clause as to.....	117
carrier forbidden to prevent continuous carriage over.....	145
Conflict of authority as to discrimination among carriers.....	79
Confiscation of property of illegal trust authorized	298
of property under Wilson bill	305
Competition creates dissimilarity of circumstances as to long and	
short-haul clause	91
must be <i>bona fide</i>	94
actual and potential, views of Judge Taft as to.....	96-101
ocean rates, foreign traffic	106
ocean rates, views of Justice Harlan as to (dissenting	
opinion)	108-116
Combinations and pooling prohibited	120
Commissioner of Corporations, powers of	308
Contracts, relative to pooling, must be produced	126
by carrier must be filed with commission	130
must be produced in evidence	199
as to 5,000-mile tickets must be filed	233
Contempt, failure to obey order may be punished as.....	132
for refusal to obey injunction	170
punishment by, for failure to answer	205
not triable by jury	205

	PAGE.
Continuous Carriage, unlawful for carrier to prevent.....	145
Common Law, when superseded by statute	147, 148
Concealment, under Commerce Act	149, 150
Consent, will not confer jurisdiction	163
Cooper, Congressman, proposed bill giving power to fix rates.....	193
Corporation, successors of, liable for rebates	63
interstate commerce commission is	184
bureau of, created (Act of February 14, 1903).....	307
commissioner of, powers	308
commissioner of, duties	307, 308
Complaint, how made to commission	209
Commutation Tickets authorized by Sec. 22.....	232
Couplers coupling automatically must be used.....	335, 336
Court of Interstate Commerce, bill to create, introduced by Hon. William R. Hearst	193, 194
Criminal Liability, of carrier.....	174
for false weights	175
under Sherman Act	294
Cumulative, remedies under Commerce Act are.....	232-234
Damages, shipper may recover, for unreasonable charges	53
shipper may recover for rebates	67
long and short-haul clause may be recovered by shipper.....	120
liability of carrier for	146
treble damages under State statutes	147, 148
trial by jury	224
treble damages authorized under Sherman Act.....	298
member of trust cannot sue for	302
treble damages under Wilson bill	306
party damaged by telegraph company may sue for.....	332
Danville and Lynchburg Cases, facts in	101

	PAGE.
Definitions, interstate commerce defined	32
of railroad	32, 33
of transportation	32, 33
of term "regulate"	37
of "commerce"	38
interstate and domestic commerce	39
term "common control"	41, 54
"facilities" defined	74
"unjust discrimination"	56, 57
term "pooling" defined	122
term "common arrangement" defined	140
Defense, pooling as a	127
Deviation from published rate unlawful	131
from published rates a misdemeanor	140
Departure from published rates list, of litigation to enjoin	142, 143
Department of Commerce and Labor, duties of defined	315
officers and bureaus of	315
Deposition, testimony taken by	186
how taken	187
how taken under United States Revised Statutes	206, 207
under Act of March 9, 1892	208
Discrimination forbidden by Sec. 2, Commerce Act	56, 57
as between forwarders	68
among carriers forbidden	69
against localities forbidden	69, 71
not justified when they injure the public interest	72
against carrier remedied at law	73
among carriers, conflict of authority as to	79-84
among carriers, equal facilities	82
among carriers, advance payments, through billing	84
remedy for, injunction	179
remedy for, by mandamus among carriers	239
must be shown to justify writ of mandamus	240
Dissimilarity created by competition	91-106
District Attorney must prosecute at request of attorney-general	136
District Court of United States, jurisdiction of	155
District of Columbia, Safety Appliance Law applicable to	339
Dissolution of association pending appeal, will not oust the court of jurisdiction	158

	PAGE.
Diversity of Citizenship not essential to jurisdiction.....	153
ground of removal from State court	165
Disobedience of witness, how punished	186
of carrier, how punished	214, 215
Disbursements of interstate commerce commission	227
Dividends, taxation of, by State	27
Dividends and Surplus must be shown in carrier's report.....	228
Dillon, Hon. John F., comments on merger decision.....	282-284
Dingley Bill continues anti-trust provisions of Wilson bill.....	306
Domestic Commerce, rights of State as to	45, 48
long and short-haul provisions as to	90
reports of, when not compulsory	231
not governed by Sherman Act.....	266
Drawbars, standard height of, prescribed	337
Drummers, taxation of	27, 28
Duty, State cannot impose	3
of carriers toward connecting lines	69
Due Process of Law must be observed	4
Elkins Act (February 19, 1903).	
text of Sec. 1	133, 134
text of Sec. 2	135
text of Sec. 3	135-137
text of Sec. 4	137, 138
text of Sec. 5	138
supplements Sec. 6 of Commerce Act.....	132, 133
violation of, misdemeanor	133
failure to publish rate under, how punishable.....	133
soliciting or paying rebates forbidden by.....	133
imprisonment abolished by	134
jurisdiction of Federal courts under	134
agent or officer of carrier punishable under	134, 135
who are proper parties under	135
adherence to publish rates enforced under	135
district attorney to prosecute under	136
attorney-general may request district attorney to prosecute under	136
immunity of witnesses under	137
comments as to	138-140

INDEX.**363**

	PAGE.
Elevators for storing grain, power of State to regulate	14
Elements in fixing rates	196
Eminent Domain for interstate commerce	40
Employees, number of, must be shown in carrier's report.....	228
when not deemed negligent	338
English State, forbidding rebates and discrimination	58, 59
Expedition Act of February 11, 1903, text of.....	219, 220
Equity pleading, in suit for discrimination.....	149
Equity Jurisdiction as to rates	157
See also JURISDICTION.	
Equal Facilities to telegraph companies compulsory	329
See also FACILITIES.	
Evidence, comparison of rates not sufficient under long and short-	
haul clause	117
related to pooling must be produced	126
as to rates, commission as experts	170
taken by deposition	186
commission must act on competent	195
not compulsory prior to 1893	196, 197
compulsory under Elkins Act	137
books must be produced in	199
mode of securing, under Commerce Act.....	200
findings of commission not conclusive	221
monthly reports of accidents not to be used in	230
necessity of means of securing	312
Express Companies, when not subject to Interstate Commerce Act.	53
Excessive Charges, carrier liable for, at common law.....	60
carrier liable for, under State laws.....	61
facilities to	79
Expenses of carrier cannot be paid by excessive charges.....	116
Expedition Act (February 11, 1903), extended under Elkins Act..	137
text of	219
Experts, interstate commerce commission are, as to rates.....	170
Excursion Rates authorized by Sec. 22	232

	PAGE.
Facilities, term defined	74
switch and sidings	74
to shipper, switch sidings	75, 76
when contract is void	76
reasonable regulations as to	76
spur tracks	77
to carrier, express companies for	79
when may be compelled by carrier	82
use of tracks under Sec. 3	86
for switching, when do not involve Federal question	161
to connecting lines of telegraph companies compulsory	329
failure to grant, by telegraph company may be prosecuted civilly and criminally	332
to telegraph companies compulsory	329
Fares, contracts as to, on 5,000-mile tickets, must be filed	233
See also RATES .	
Fares and Charges. See RATES.	
False Weights, criminal liability for	175
False Bills, criminal liability for	175
False Classification, criminal liability for	175
Fact, question of, no bar to writ of mandamus	239
Federal Corporation, taxation of	18
Federal Courts, jurisdiction of	151, 171
See also JURISDICTION .	
jurisdiction of, under Sherman Act	295
See also JURISDICTION .	
Federal Question in suits against carriers	157
on removal from State court	160, 161
Fees of foreign witness	187
Fees and Expenses of interstate commerce commission	226
Fish, sale of, under State laws	5, 6
Findings of commission are <i>prima facie</i> evidence	213
by commission not conclusive	221
Five-Thousand-Mile Tickets authorized by Sec. 22	233
contracts as to, must be filed	233
Foreign Corporation, taxation of	26

INDEX.

365

	PAGE.
Foreign Charter, taxation of	26
Forwarders, discrimination as between	68
Force to obstruct interstate commerce, remedy, injunction.....	157
Forms.	
complaint, Form 1	351
complaint, Form 2	352
answer, Form 3	352
notice of hearing, Form 4	353
subpoena, Form 5	353
notice to take deposition, Form 6.....	354
Freight, must be carried over connecting lines	145
Fraudulent Concealment under Commerce Act	149, 150
Free Passes, when authorized	234
when forbidden	236
Game Laws, State laws as to	5
Lacey Act relating to	6
Georgia, statute of, as to telegraph messages upheld.....	326, 327
text of the statute	328, 329
Government, rights of, as to telegraph lines, how enforced.....	331
See also UNITED STATES.	
Grain Elevators, power of State to regulate.....	14
Grosscup, Hon. Peter, injunction granted by, in Beef Trust case...	289
Grab Irons, carrier must use	336
Harlan, Hon. John M., dissenting opinion as to ocean competi- tion	109-116
dissenting opinion in Sugar Trust case.....	255 <i>et seq.</i>
Handholds, carrier must equip cars with	336
Hearst, Hon. William Randolph, bill of, to fix rates and create Court of Interstate Commerce	193, 194
Height, standard height of drawbars	337
Immunity under the Constitution	3
from being witness	4
of witness under Act of February 11, 1893	188
none to corporations under Act of February 11, 1893.....	205

	PAGE.
Imprisonment abolished by Elkins Act	134
penalty of, abolished by Elkins Act	134, 174
penalty for violation of Sherman Act.....	248, 294
Importers forbidden to create trust, under Wilson bill	303, 304
Interstate Commerce, taxation of property used in.....	21-23
defined	32
Interstate Commerce Act.	
text of Sec. 1.....	32, 33
text of Sec. 2.....	56, 57
text of Sec. 3.....	69
text of Sec. 4.....	89
text of Sec. 5.....	121
text of Sec. 6.....	128-132
text of Sec. 7.....	145
text of Sec. 8.....	146
text of Sec. 9.....	152
text of Sec. 10.....	174-176
text of Sec. 11.....	181, 182
text of Sec. 12.....	184-188
text of Sec. 13.....	209, 210
text of Sec. 14.....	212
text of Sec. 15.....	213, 214
text of Sec. 16.....	214-218
text of Sec. 17.....	225
text of Sec. 18.....	226
text of Sec. 19.....	227
text of Sec. 20.....	228, 229
text of Sec. 21.....	231, 232
text of Sec. 22.....	232-234
text of Sec. 23.....	237
object of	34, 35
when stoppage of trains, regulation of.....	49-52
when Sunday trains, not.....	52
obstruction to, remedy injunction	157
who may invoke "any person"	211
State court has no jurisdiction under.....	161
jurisdiction of Federal courts under.....	155
when express companies not subject to.....	53
Interstate Commerce Commission, order of, against carrier binds	
successor	54
may publish proposed rates	130
are experts as to rates.....	170
created under Sec. 11.....	181

Interstate Commerce Commission — Continued.	PAGE.
how commission appointed	182
is a corporation	184
powers of, defined	184, 185
has no power to fix rates	183
pending legislation to secure power	183, 191, 192
must act on competent evidence.....	195
investigations by, how conducted.....	209, 210
reports of, how made.....	212
may make judgments and orders.....	213, 214
procedure before, how conducted.....	225
must report annually to Congress.....	231
may enforce provisions of telegraph acts.....	330
power of, to enforce Safety Appliance Law.....	340
rules of practice before.....	342
Interstate Rates, cannot be prescribed by State commission.....	45
Injunction, remedy of carrier against State railroad commission....	45
remedy by, under Elkins Act.....	65
remedy for discrimination	71
list of suits for, to enjoin departure from published rates.....	142
remedy for forcible obstruction to interstate commerce.....	157
nature of remedy by	169
restitution pending	169
when remedy for discrimination	179
power of court to issue under Sec. 16.....	215
when proper remedy	224
text of, in Merger case	281, 282
text of, in Beef Trust case.....	289
right to, notwithstanding claim that plaintiff violates Sherman Act	292
when carrier not entitled to, against ticket scalpers.....	292
remedy by, under Sherman Act.....	295
authorized under the Wilson bill.....	305
Information, publication of, by bureau of corporations.....	309
Investigations, how conducted by commission.....	209, 210
Indictment for giving rebates, form of.....	63
when lies against receiver for false billing.....	178
Interlocutory Judgments, appeals from	173
Iron Pipe Trust, known as Addystone Pipe case.....	267
Jim Crow Cars, when use of, domestic commerce.....	39, 40
Joint Traffic, term defined	117

	PAGE.
Joint Traffic Association case	122, 264
Joint Rates, notice of advance or reduction.....	130
agreements as to, must be filed.....	233
See also RATES.	
Jury Trial preserved under Constitution.....	4
Jury must pass on question of reasonableness of tax.....	24
none in contempt proceedings.....	205
trial by, under Sec. 16.....	217
how waived	218
trial by, as to damages	224
Jurisdiction of Federal courts under Sherman Act.....	295
under the Wilson bill	305
of Federal court under Elkins Act	134
diversity of citizenship not essential to.....	153
of U. S. Circuit Court	154
of U. S. District Court	155
of Federal courts under Interstate Commerce Act.....	155
Federal jurisdiction exclusive	156
of Federal courts — Federal question	157
in case of forcible obstruction to interstate commerce.....	157
in equity, as to rates	157
not ousted by acts pending appeal	158
on removal of action from State court.....	159-169
none in State court under Commerce Act.....	161
not conferred by consent.....	163
over all carriers for breach by one.....	222
Judicial Question, reasonableness of rates is.....	55
Lacey Act as to State Game Laws.....	6, 7
Lacombe, Hon. E. Henry, decision by, in New York and Northern case	82
Lagrange Cases, facts in	102
Land, suit affecting title to, removable from State court.....	167
right of telegraph company to take.....	319
Laws, State and Federal, conflict of.....	42
Legislature, power over domestic commerce	1, 2
Legislation pending in Congress to give power to fix rates....	183, 192
Liquor, interstate traffic in, how far legal	9-12
for private use.....	12

INDEX.

369

	PAGE.
Live Stock, when State may legislate as to.....	46
Liability, of carrier for giving rebates.....	63
form of indictment	63
of carrier making through rates over connecting lines.....	89
of receiver for deviation from published rate.....	140
of carrier under Sec. 8, Commerce Act.....	146
joint and several, of shipper and carrier.....	176
Little Rock Cases, decisions affecting.....	85-88
Litigation, list of, to compel compliance with published rates.....	142
Limitation of Actions, under Commerce Act.....	149, 150
Lottery Tickets, sale of, constitutes commerce.....	38, 39
Localities, discrimination against, forbidden.....	69-71
Long and Short Haul, provisions of Sec. 4 as to.....	89
power of commission as to	89
competition primary factor as to charges for.....	91
as to connecting lines.....	117
mode of fixing rates as to.....	119
when damages may be recovered	120
Local Prejudice, suit may be removed from State court for.....	165
Mandamus, to compel publication of rates.....	140
power of court to issue, under Sec. 16.....	216
remedy for enforcement of Sec. 22.....	234
a cumulative remedy	235
may be granted at suit of shipper.....	237
carrier may have, against connecting carrier.....	239
when peremptory writ may issue.....	239
unjust discrimination must be shown to warrant.....	240
to prorate cars	242
alternative writ may be amended	243
basis of allotment of cars under.....	244
Manufactures, bureau of, created	316
Merger Case, status of the court in.....	125
facts involved in	274
further considered	275
territory affected by	280
text of injunction in	281, 282
professional comment on, views of Judge Dillon.....	282-284

	PAGE.
Misdemeanor, violation of Elkins Act is.....	133
soliciting or paying rebates is.....	133
to contract in restraint of trade.....	248
violation of telegraph acts is.....	332
Mileage Tickets, authorized by Sec. 22.....	232
Mixed Car Loads, discrimination as to.....	68
Monopolies, condemned by Sherman Act.....	247, 248
illegal under Sec. 2, Sherman Act.....	294
by importers, forbidden by Wilson bill.....	304
as to telegraph, State cannot create.....	322
National Bank, citizenship of, under Removal Act.....	168
Negligence, when not attributable to employee of carrier.....	338
Notice of advance or reduction of rates.....	130
Obstruction to interstate commerce, remedy injunction.....	157
Ocean Competition, foreign rates affecting long and short-haul clause	106
Order, of commission, effect of compliance with.....	213
of Commission, when not enforced as to terminal charges.....	223
Parties in rebate suits, those who receive are proper.....	69
who are proper under Elkins Act.....	135
enjoined under "common control".....	170
in proceedings under Commerce Act.....	224
who are proper under Sherman Act.....	298
who are proper, under Wilson bill.....	305
Party-Rate Tickets, when authorized.....	234, 236
Passes, when forbidden	236
Pay Territory, how allotted by trust.....	268, 269
Peckham, Hon. Rufus W., reference to Sugar Trust case by.....	256
extract from opinion of, in Tile Trust case.....	302
Peddlers' Licenses, power of State to tax.....	29
Penalties, for failure to publish.....	131
for failure to publish rates.....	131
of disobedience of witness.....	186
for refusal to testify	189
when not to exceed \$500 per day.....	216
for failure of carrier to report accidents.....	230

Penalties — Continued.	PAGE.
as to telegraph companies.....	320
under Safety Appliance Law, how recovered.....	337
under Safety Appliance Law	340
Perjury punished, Act of February 11, 1893.....	189
Pleading in suits for rebates.....	66
in suit at law by shipper.....	148
in suit in equity for discrimination.....	149
in Beef Trust case	286
Post Offices, Congress must establish.....	3
Post Roads, Congress can establish.....	3
Powers Reserved by the States or the people.....	4
Police Power remains in the States.....	4, 5
State legislation as to	4, 5
Sunday trains	8
Jim Crow cars	9
Pooling and combinations prohibited.....	120
agreements for, unlawful	122-126
contracts related to, must be produced.....	126
when defense in suit against ticket scalper.....	127
when defense to action by carrier	292
Power to Fix Rates, none in commission.....	183
pending legislation to secure power	183, 191, 192
Power of interstate commerce commission defined	184, 185
none to fix rates	183, 191, 196
Privileges under the Constitution	3
Preferences, unreasonable, forbidden	69
of suits under Expedition Act of February 11, 1903.....	219
Prima Facie Evidence, findings of commission are.....	213
Procedure before interstate commerce commission, how conducted..	225
Pro-rating Cars, may be compelled by mandamus.....	242
Prices, how advanced by the trusts.....	271
Practice, rules of, before interstate commerce commission.....	342
Publication of rates of carrier.....	128
of rates compelled by mandamus	140
deviation from misdemeanor.....	140
of information by bureau of corporations	312

	PAGE.
Public Domain, open to any telegraph company.....	319
Quarles, Senator, proposed bill giving power to fix rates.....	193
Question of Fact no bar to issue of mandamus.....	239
Railroad Commission of State may complain to interstate commerce commission	210
Railroad Trusts, cases of	262
Rates, power of State to prescribe.....	43, 44
of freight and fare can be prescribed by State on interstate business	45
State may prescribe, as to domestic commerce.....	46
as to ocean competition, long and short-haul clause.....	106-116
mode of fixing as to long and short haul.....	119
schedule of, must be published.....	128
through foreign country must be published.....	128
notice of advance of.....	129
published rate alone legal	129
deviation from, unlawful	131
published, when conclusive	135
adherence to, how enforced	135
publication of, compelled by mandamus.....	140
litigation to compel compliance with, published.....	142
equity jurisdiction as to	157
See also JURISDICTION.	
interstate commerce commission are experts as to.....	170
commission has no power to fix.....	183, 191, 192
legislation pending to secure power.....	192
must be reasonable	195
elements to be considered in fixing.....	196
when free, or reduced rates legal.....	232
Reasonable, all rates and charges must be.....	33
Reasonableness of rates a judicial question.....	55
elements of risk and value pertinent as to.....	56
Reasonable Regulations as to facilities	76
Rebates forbidden by Sec. 2, Commerce Act.....	56, 57
provisions of English statute as to.....	58, 59
forbidden by Elkins Act	59
receiver of, liable as well as giver.....	60
criminal liability for	63
form of indictment for.....	63
terminal charges	64
pleading in suits for	66
soliciting or paying, is a misdemeanor.....	133

	PAGE.
Rebate Suits, jurisdiction in, proper district.....	156
Receiver of carrier, when liable.....	55
liability of, for deviation from published rate.....	140
governed by State laws.....	167
when indictable	177
"Regulate," term defined	37
Remedy, at common law, when not superseded by statute.....	62
for discrimination by injunction	71
for discrimination against carrier.....	73
of shipper under Commerce Act in alternative, either before the commission or in court	152
by injunction, nature of	169
by injunction, when proper	224
under Commerce Act, cumulative	232-235
Revised Statutes of United States.	
as to telegraphs	319-321
as to taking depositions	206, 207
Revival of action under Commerce Act.....	150
Removal from State Court, jurisdiction on.....	159-169
suit under Commerce Act not removable from State court....	164
mode of Acts of 1875 and 1888.....	165
Restitution pending investigation	169
Reports of interstate commerce commission, how made.....	212
how published	212
must be made by carriers to commission	228
what report must show.....	228
by commission to Congress, annually	231
of domestic commerce, when not compulsory.....	231
must be filed annually by telegraph company.....	333
penalties for failure to file.....	334
Reports of Accidents required monthly (Act of March 3, 1901)....	229
not to be used in evidence.....	230
Reserved Cities, how allotted by trust.....	268
Retroactive, provisions of Sherman Act are.....	290
Risk, element in ascertaining if rate is reasonable.....	56

	PAGE.
Route, shipper has right to designate.....	245
of transportation of sheep, owner may select.....	17
Rules of practice before Interstate Commerce Commission.....	342
public sessions of commission, Rule 1.....	342
parties to cases, Rule 2.....	342
complaints, Rule 3.....	343
answers, Rule 3.....	343
demurrer, Rule 4.....	344
service of papers, Rule 5.....	344
affidavits, Rule 6.....	344
amendments, Rule 7.....	344
adjournments, Rule 9.....	344
stipulations, Rule 10.....	344
hearings, Rule 11.....	345
depositions, Rule 12.....	345
witnesses and subpoenas, Rule 13.....	346
findings and briefs, Rule 14.....	346
rehearings, Rule 15.....	346
printing pleadings, Rule 16.....	348
copies of papers and testimony, Rule 17.....	348
compliance with orders, Rule 18.....	348
applications by carriers, Rule 19.....	348
information, Rule 20.....	349
address of commission, Rule 21.....	349
Safety Appliance Law (March 2, 1893):	
text of Sec. 1.....	335, 336
text of Sec. 2.....	336
text of Sec. 3.....	336
text of Sec. 4.....	336, 337
text of Sec. 5.....	337
text of Sec. 6.....	337, 338
text of Sec. 7.....	338
text of Sec. 8.....	338, 339
Safety Appliance Law (Supplement, 1903):	
text of Sec. 1.....	339, 340
text of Sec. 2.....	340, 341
text of Sec. 3.....	341
extended to District of Columbia and Territories (Act of 1903).....	339
enforced by Interstate Commerce Commission.....	340
penalties under, how recovered.....	337
Safety Appliances, carriers must use (Act of 1893).....	335
Salary of Interstate Commerce Commission.....	226

	PAGE.
Schedules, of form as to.....	131
Search, when prohibited	3
Seizure and Search, when prohibited.....	3
Sessions of interstate commerce commission, where held	227
Secretary of Commerce and Labor may assign duties to commis- sioner of corporations	308
Sherman Act:	
text of Sec. 1.....	247, 248
text of Sec. 2.....	294
text of Sec. 3.....	295, 296
text of Sec. 4.....	297, 298
text of Sec. 5.....	298
text of Sec. 6.....	298
text of Sec. 7.....	298, 299
text of Sec. 8.....	303
comments as to	248, 249
constitutionality of	249
authorities under	250, 251
legal propositions deducible from	251, 252
relates to interstate, not to domestic commerce.....	266
provisions of, retroactive	290
violation of, when will not defeat right to injunction.....	292
jurisdiction of Federal courts under.....	295
testimony of witness compulsory under	296, 297
treble damages authorized by Sec. 7.....	298
Shipper may recover damages for unreasonable charges.....	53
may demand switches and sidings as facilities.....	75
when contract with, for facilities void.....	76
reasonable regulations as to facilities for.....	76
may recover damages under long and short-haul clause.....	120
pleading by, in suit at law	148
must elect to go before commission or bring suit in Federal court	152
criminal liability of	175
may have writ of mandamus to move traffic.....	237
mandamus to furnish cars	237
has right to designate route.....	245
Shipping, facilities for	74-77
Short Haul, greater charge for short than for long haul forbidden..	89
Sidings and Switches are facilities for transportation.....	74, 75

	PAGE.
Social Circle Case, facts in.....	103
map showing territory, mileage, and destination.....	103
Speed of Trains, when State may regulate.....	53
Spur Tracks as facilities for shipping.....	77
State, power of, over domestic commerce.....	1, 2
power of, to prescribe rates.....	43, 44
cannot legislate as to interstate commerce	45, 48
may legislate as to domestic commerce.....	48
when may legislate as to stoppage of trains.....	49-52
when may legislate as to Sunday trains.....	52
when may regulate speed of trains.....	53
may prohibit rebates on domestic commerce.....	61
treble damages under law of.....	148
laws of, govern receiver	167
may regulate "switching" charges.....	171
railroad commission may complain to interstate commerce com- mission	210
anti-trust laws of, cannot be invoked collaterally.....	294
cannot create telegraph monopoly	322
laws of, as to telegraphic messages	325 <i>et seq.</i>
State Laws as to sale of game and fish.....	4, 5
as to sale of liquor.....	9-12
as to grain elevators	14
as to taxation	15-17
as to railroad	41
and Federal laws	42
as to taxing property used in interstate commerce.....	21-25
as to taxing drummers and agents.....	27-29
State Railroad, when bound by Interstate Commerce Act.....	41
State Commission may be enjoined by carrier from prescribing in- terstate rate	45
rights as to domestic commerce	46
State Court, jurisdiction on removal from.....	159-169
has no jurisdiction under Commerce Act	161
statute authorizing removal from	165
Statute of Limitations under Commerce Act.....	149, 150
Stoppage of Trains, when a regulation of interstate commerce.....	49
Stoppage to prevent carriage, over connecting lines forbidden.....	145

	PAGE.
Stockyards, facilities for feeding	76
Stock, naked, right to purchase not illegal.....	276
Sunday Trains, State laws as to.....	8, 9
when regulated by a State.....	52
Sumptuary Laws, Wilson Act as to.....	9, 10
Successors of carrier, when bound by order to carrier.....	54
when liable for rebates.....	63
Supreme Court, appeal or writ of error direct to, under Act of February 11, 1903	171, 172
appeal to, under Sec. 16.....	216, 218
appeal direct to, under Act of February 11, 1903	219, 220
See also APPEAL; WRIT OF ERROR.	
Sugar Trust, facts involved in.....	253
dissenting opinion of Harlan, J., in.....	255 <i>et seq.</i>
Switch and Sidings are facilities for transportation	74, 75
Switching Facilities, when action as to, not removable to Federal court	161
Switching, charges may be regulated by State.....	171
Taxes, constitutional provision as to	3
Taxation, power of States as to	15-17
of Federal corporation	18
Income Tax cases	19, 20
unit rule as to	20, 21
reasonableness of, question for jury.....	24
of foreign corporation	26
of dividends on stock	27
of drummers and agents	27
of telegraph company by State.....	323
Taft, Hon. William H., as to actual and potential competition..	96-101
Text of constitutional provisions as to personal and private rights	3, 4
Testimony taken by deposition	186
made compulsory in 1893	196
Terminal Charge, when cartage is not.....	118
when not enforced	223
Territory, how apportioned by pipe trust.....	270
affected by Merger decision	280
Safety Appliance Law applicable to	339

Telegraph Acts (U. S. Revised Statutes).	PAGE.
text of Sec. 5263.....	319
text of Sec. 5264.....	319
text of Sec. 5265.....	320
text of Sec. 5266.....	320
text of Sec. 5267.....	320
text of Sec. 5268.....	320
text of Sec. 5269.....	320, 321
 Telegraph Acts (August 7, 1888).	
text of Sec. 1.....	318, 319
text of Sec. 2.....	329, 330
text of Sec. 3.....	330, 331
text of Sec. 4.....	331, 332
text of Sec. 5.....	332, 333
text of Sec. 6.....	333, 334
text of Sec. 7.....	334, 335
right to amend, reserved .	334
 Telegraph Companies, acts of Congress as to.....	318
must file annual reports	333 <i>et seq.</i>
See also TELEGRAPH.	
 Telegraph, railroad must itself operate.....	318, 319
public domain open to any	319
right of company to take timber.....	319
government messages by	320
government may purchase	320
company must accept provisions of U. S. Revised Statutes...	320
controlled by Congress	321
company is common carrier	323
taxation of, by State	324
State laws as to sending messages.....	325 <i>et seq.</i>
companies connecting, rights of	329
laws as to, enforced by interstate commerce commission.....	330
contracts as to, must be filed.....	333
 Through Billing, when may be demanded by connecting carrier. 84-145	
 Through Rates, liability of connecting lines as to.....	89
 Ticket Scalper, when may set up ticket pooling as defense.....	127
 Ticket Scalping, when carrier not entitled to injunction against...	292
 Tickets, various kinds, carrier may issue.....	234
party-rate tickets	236
See also RATES.	

	PAGE.
Title Trust, case of <i>Montague v. Lowry</i>.....	273
constitution and by-laws of.....	299, 300
illegal under Sherman Act.....	301
Timber, right of telegraph company to take.....	319
Tracks, use of, by connecting carriers.....	69-86
Trade, contracts in restraint of, illegal.....	247, 248
contract in restraint of, illegal.....	295
See also TRUSTS.	
Trans-Missouri Case, status of the court in.....	125
Treble Damages under State statutes.....	147, 148
may be recovered under Sherman Act.....	298
authorized by Wilson bill.....	306
Trial by Jury preserved under the Constitution.....	4
none in contempt proceedings.....	205, 206
under Sec. 16	217
how waived	218
as to damages	224
Trustee of carrier, when liable.....	55
Trust, Coal Trust illegal	204
illegal, under Sherman Act.....	247, 248
the Sugar Trust	253
Railroad Trust cases	262
Cattle Trust cases	265
iron pipe trust, Addystone Pipe case.....	267
allotment of "pay territory" by.....	269
auditor, executive officer of.....	271
Beef Trust declared illegal	284
State laws against, when cannot be invoked collaterally.....	294
agreement to form, illegal	294
property of, may be confiscated.....	298
Title Trust illegal	301
prohibited by Wilson bill	303
property of, may be confiscated under Wilson bill.....	305
Trust Property, when may be confiscated.....	298
United States may invoke injunction against discrimination.....	179
rights of, as to telegraph lines, how enforced.....	331
United States District Court.....	155
See DISTRICT COURT OF UNITED STATES.	

United States Circuit Court. See CIRCUIT COURT.	PAGE.
United States Revised Statutes, as to taking depositions.....	207
Unreasonable Charges, shipper may recover damages for.....	53
when a judicial question	55
Unreasonable Rates, not justified to enable carrier to pay expenses.	116
Value, element in ascertaining if rate is reasonable.....	56
Van Zandt, governor of Minnesota, comment on Merger case.....	282
Wallace, Hon. William J., on power to issue mandamus.....	241
Waite, Hon. Morrison R., opinion as to government control of tele- graph	321
Witness forbidden to testify against himself.....	3
must testify under Elkins Act.....	137
attendance of, compulsory	185, 186
disobedience of, how punished	186
fees of foreign	187
must answer, under Act of February 11, 1893.....	188
immunity of	188
punishment of, for refusal to testify.....	189
must answer	198
testimony compulsory under Sherman Act.....	296
Wilson Act as to sale of liquor under State laws.....	10
Wilson Bill (1894, chap. 349).	
text of Sec. 73.....	304
text of Sec. 74.....	305
text of Sec. 75.....	305
text of Sec. 76.....	305, 306
text of Sec. 77.....	306
Williams, Hon. John Sharp, text of proposed bill of giving power to fix rates	194
reasons for proposed bill.....	194, 195
Writ of Error to United States Circuit Court of Appeals....	171, 172
to United States Supreme Court.....	171-173, 219, 220
See also APPEAL.	

SUPPLEMENT
TO
SNYDER'S INTERSTATE COMMERCE ACT
AND
FEDERAL ANTI-TRUST LAWS

EMBRACING
THE RAILWAY RATE BILL
APPROVED JUNE 29, 1906, AMENDING THE COM-
MERCE ACT AND ELKINS ACT

WITH AN INTRODUCTION
AND FULL NOTES OF JUDICIAL DECISIONS REN-
DERED SINCE THE PUBLICATION OF THE
WORK IN JULY, 1904, WITH A REFER-
ENCE TO THE ANTI-TRUST LAWS
OF THE SEVERAL STATES.

INCLUDING ALSO
THE EMPLOYERS' LIABILITY BILL, PURE FOOD BILL, MEAT
INSPECTION BILL AND HALL-MARK OR JEWELERS'
LIABILITY BILL.

CONTAINING ALSO INDEX AND TABLE OF CASES

By WILLIAM L. SNYDER
OF THE NEW YORK BAR

NEW YORK
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TABLE OF CONTENTS.

INTRODUCTION.

	PAGE.
Federal control	iii
Railways of the United States	iv
Railway legislation prior to 1906	vi
Community of interest among carriers	vii
Need of supplemental legislation	viii
Result of carrier being dealer	ix
Legislation of 1906	x
Results achieved by legislation of 1906	xi
As to free passes	xii
Bills of lading compulsory	xiv
Coastwise steamships and carriers by water	xy
Imprisonment — Penalty	xviii
Imprisonment — Penalty for rebating	xix
Railways not to engage in business	xx
Coal properties controlled by carriers	xxii
Power of visitation and supervision	xxv
Records of carrier must be uniform	xxvii
Appraisal of railroad property	xxix
The Chesapeake and Ohio case and Tobacco Trust decisions.....	xxxi
The Tobacco Trust cases	xxxiv
Employers' liability bill	xxxvi
Pure food legislation	xxxix
Hall-Mark or Jewelers' liability bill	xxxix

CHAPTER I.

Analysis of Interstate Commerce Act.

Sec. 1. Interstate commerce defined — Definitions — Common carrier — Railroad transportation — Charges must be reasonable — Free transportation, when prohibited — Carriers not to deal in commodities transported — Switches and terminal facilities	1-6
2. Rebates prohibited — Unjust discrimination defined....	6
3. Preferences and advantages — Duty of connecting lines.	6
4. Long and short haul regulations — Power of commission	6, 7

TABLE OF CONTENTS.

	PAGE.
SEC. 5. Pools and combinations prohibited	7
6. Schedule of rates to be published — Rates through foreign country — Change of rates must be on notice — Provision as to joint tariff rates — Publication condition precedent — Preference time of war	7-10
Elkins Act—Sec. 1. Liability for acts of agents, receivers, trustees, etc. — Rebates — Forfeiture of three times amount as additional penalty	10-13
7. Commerce act — Continuous carriage from point of shipment to point of destination	13
8. Liability of carrier in damages	14
9. Remedy of shipper in alternative by complaint to commission or suit in Federal court	14
10. Criminal liability of carrier — Criminal liability of carrier for false bills, weights or classification — Criminal liability of shipper for false weights, bills or classification — Joint and several liability of shipper and carrier	14-17
11. Interstate Commerce Commission created	17
12. Commission may prosecute through United States District Attorney — Witnesses — Attendance compulsory — Penalty for disobedience of witness — Testimony taken by deposition — Deposition, how taken — Foreign witnesses — Fees	18-20
13. Complaint to commission, how made — Investigations, how conducted — Complaints by State Railroad Commission	20
14. Reports and findings of commission shall be evidence..	20-21
15. Commission may fix rates — When order of commission takes effect — Supplemental order, joint rates — Payment by carrier for services and instrumentalities..	21-23
16. Order for damages, how enforced — Findings of commission <i>prima facie</i> evidence — Damage claims to be mission <i>prima facie</i> evidence — Damage claims to be filed within two years — Damage claims — Parties — Order, how served, modification or suspension of — Orders, how enforced — Penalties and forfeitures — When orders enforced by injunction — Appeal — Venue — Provisions as to court review — Schedules filed <i>prima facie</i> evidence	23-28
16a. Application for rehearing	28, 29
17. Procedure before Interstate Commerce Commission	29
18. Salary of commission — Fees and expenses	29
19. Sessions of commission, where held	30

TABLE OF CONTENTS.

	PAGE.
Sec. 20. Annual reports—Contents—Uniformity—Uniform books and accounts of carriers, when compulsory—Mandamus on application of commission or attorney-general—Bill of lading compulsory—Initial carrier liable for damages	30-34
21. Commission to make annual reports to Congress.....	35
22. Free or reduced rates—Excursions—Mileage—Commutation rates—Remedies cumulative	35-36
23. Remedy by mandamus to move traffic or furnish cars..	36-37
24. Commerce commission enlarged—Salaries—Term of office	37
Act June 29, 1906. Application of existing laws—Repealer—Act to take effect	37-38

CHAPTER II.

I. Constitutional Limitations—Sumptuary Laws—Police Power.

Sec. 1. Interstate commerce—Original package, what constitutes	39
2. Interstate commerce—When State liquor laws not operative as to	40
3. Interstate commerce—When sale of liquors is not.....	42
4. Interstate commerce—Sale of liquors—Wilson Act construed	43
5. Interstate commerce—State law cannot compel furnishing cars for	44
6. Interstate commerce—Taxation—Business within the State	45

II. Constitutional Limitations—Immunity.

7. Immunity defined—Immunity statute	45
8. Immunity under Federal statute—Act of Feb. 25, 1903, construed	47
9. Immunity under State statute—Constitutionality sustained	48
10. Immunity—Examination before grand jury	49
11. Immunity—Testimony before grand jury	50
12. Immunity does not extend to corporation	52
13. Immunity from search and seizure extends to corporation	53

III. Commerce Act—Elkins Act—Pooling Rebates—Discrimination.

Sec. 14. Unreasonable rates—Charges based on shippers' profits.	54
15. Pooling—What constitutes	55

TABLE OF CONTENTS.

	PAGE.
Sec. 16. Pooling — When joint through rate is not	55
17. Discrimination — When denial of right of shipper to designate route is not	59
18. Rebates — Discrimination — Freight classification.....	61
19. Discrimination — Transportation of troops	62
IV. Commerce Act — Carrier Cannot be a Dealer.	
Sec. 20. Carriers cannot deal in commodities which they trans- port	63
21. Carrier cannot be a dealer — Legislation of 1906 as to..	68
V. Imprisonment — Crimes and Conspiracies.	
Sec. 22. Imprisonment — Conspiracy against United States	69
23. Criminal liability — Rebates — Concessions — Foreign shipments	73
24. Criminal liability — Concessions — Overlapping contracts.	75
VI. Commerce Act — Mandamus.	
Sec. 25. Mandamus — Effect of new legislation as to	76
26. Mandamus — Jurisdiction of Federal court as to.....	77
27. Mandamus — Writ may fix percentage of cars	78
28. Mandamus — Right to, not affected by contract with carrier	79
VII. Commerce Act — Jurisdiction — Evidence — Remedies — Procedure.	
Sec. 29. Jurisdiction of Federal courts	81
30. Jurisdiction acquired only by proper service.....	83
31. Federal question	84
32. Appeal directly to Supreme Court of the United States — Under Act of February 11, 1903	85
33. Appeal directly to Supreme Court, under Court of Ap- peal Act of March 3, 1891	86
34. Evidence — Documentary evidence under Commerce Act..	87
35. Remedies — Orders of commission — Legislation of 1906.	87
36. Orders for payment of money — Damages	89
37. Orders for damages, how enforced	92
38. Orders enforced in equity	93
39. Lawfulness of order — How reviewed	94
40. Evidence — Burden of proof — Findings of commission <i>prima facie</i> evidence	94
40a. Burden of proof — Drug Trust	95
40b. Pleadings under Sherman Act	96
40c. Assignment of claims — Jurisdiction — Rights of assignor in Federal court	97
40d. Switches on private land — Injunction	99

TABLE OF CONTENTS.

VIII. Criminal Trusts Under Sherman Act.

	PAGE.
SEC. 41. Jurisdiction—Action pending in State court, when no bar under Sherman Act	100
42. Municipal corporation may recover damages under	101
43. Measure of damages under Sherman Act	101
44. Liability of individual members of trust	102
45. Statute of Limitations applicable to Sherman Act.....	102
46. Beef Trust an unlawful conspiracy under	103
47. Stock quotations, when not within	104
48. Sale of steamboats and business of carrier, when not within—Trust—When contract of sale of steamboats is not	105
49. Sale of mercantile business and good will, when not within	106
50. Agreement not to sell goods outside the State, not within Sherman Act	107
51. Illegal contract under—When not enforceable—Rights of parties	108
52. Book Trust—Copyright—Blacklisting void under Sher- man Act	108
53. Book Trust—When owner of copyright can control sale.	110
53a. Patent right will protect trust	110
54. Boycott—Conspiracy to boycott restrained by injunc- tion	111
54a. Blacklisting prohibited as to employees of carriers en- gaged in interstate commerce	113
54b. Injunction proceedings in State court, when forbidden..	114

IX. State Anti-Trust Laws—Common Law Trusts.

SEN. 55. State anti-trust laws	115
56. Federal courts cannot punish common-law trusts... 115-118	
57. Common law, as to trusts and conspiracies in restraint of trade	118
57a. State anti-trust laws upheld	121
58. Kansas Anti-Trust Law sustained	121
59. Missouri Anti-Trust Law—Purchaser relieved in suit by the trust	123

X. State Anti-Trust Laws Enumerated.

SEC. 60. State anti-trust laws enumerated	126
--------------------------------------------------------	-----

XI. Telegraph Companies.

SEC. 61. As to right of Eminent Domain Act of July 24, 1866....	130
------------------------------------------------------------------------	-----

TABLE OF CONTENTS.

XII. Safety Appliance Law.

	PAGE.
SEC. 62. Safety Appliance Law — Automatic couplers, different types — Liability of carrier to employee	131
63. Safety Appliance Law — Penalties — Liability of carrier for penalty	131

CHAPTER III.

New interstate commerce legislation	133
Employers' Liability Bill	134-136
Pure Food Bill	136-144
Meat Inspection Bill	144-152
Hall-Mark or Jewelers' Liability Bill	152-157

TITLES OF ACTS OF CONGRESS CITED AND REFERRED TO.

1789. SEPT. 24. AN ACT to establish the Judicial Courts of the United States.
1875. MARCH 3. AN ACT to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts and for other purposes.
1886. JUNE 29. AN ACT to legalize the incorporation of Trades Unions.
1887. FEB. 4. AN ACT to regulate commerce.
1888. AUG. 13. AN ACT to correct the enrollment of An Act approved March 3, 1887, entitled "An Act to amend sections 1, 2, 3 and 10 of An Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from the State Courts and for other purposes."
1890. JULY 2. AN ACT to protect trade and commerce against unlawful restraints and monopolies.
1890. AUG. 8. AN ACT to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.
1893. FEB. 11. AN ACT in relation to testimony before the Interstate Commerce Commission and in cases or proceedings under or connected with An Act entitled "An Act to regulate commerce," approved February 4, 1887, and amendments thereto.
1893. FEB. 13. AN ACT relating to navigation of vessels, bills-of-lading and to certain obligations, duties and rights in connection with the carriage of property.
1894. AUG. 27. AN ACT to reduce taxation to provide revenue for the government and for other purposes. Became a law without the President's signature.
1898. JUNE 1. AN ACT concerning carriers engaged in interstate commerce and their employees.
1901. MARCH 3. AN ACT requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission.
1903. FEB. 11. AN ACT to expedite the hearing and determination of suits in equity pending or hereafter brought under the

ACTS OF CONGRESS CITED AND REFERRED TO.

act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted.

- 1903. FEB. 14.** AN ACT to establish the department of Commerce and Labor.
- 1903. FEB. 19.** AN ACT to further regulate commerce with foreign nations and among the states.
- 1903. FEB. 25.** AN ACT making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1904, and for other purposes.
- 1906. JUNE 11.** AN ACT relating to liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the states and foreign nations to their employees.
- 1906. JUNE 13.** AN ACT forbidding the importation, exportation or carriage in interstate commerce of falsely or spuriously stamped articles of merchandise made of gold or silver or their alloys, and for other purposes.
- 1906. JUNE 19.** AN ACT to further protect the public health and make more effective the national quarantine.
- 1906. JUNE 28.** A BILL to declare the true intent and meaning of parts of the acts entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February 11, 1893, and An Act entitled "An Act to establish the department of commerce and labor," approved February 14, 1903, and An Act entitled "An Act to further regulate commerce with foreign nations and among the states," approved February 19, 1903, and An Act entitled "An Act making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1904, and for other purposes," approved February 25, 1903.
- 1906. JUNE 29.** AN ACT to amend An Act entitled "An Act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.
- 1906. JUNE 30.** AN ACT making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907.
- 1906. JUNE 30.** AN ACT for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Table of Cases.

A.

	PAGE.
Addyston Pipe Case.....	96
Addyston Pipe Co. v. United States	96, xxxii
Allen v. Pullman Co.....	104
Ambler v. Eppinger.....	99
American Express Co. v. Iowa.....	41
American Steel & Wire Co. v. Speed.....	42
Andes v. Ely.....	99
Arthur v. Oaks.....	112
Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Com. Co....	56, 59
Atlanta v. Chattanooga Foundry Co.....	101, 102
Attorney-General v. Great Northern Ry. Co.....	63
Austin v. Tennessee.....	40

B.

Bement v. Nat. Harrow Company.....	110, 111
Board of Trade v. Christie Grain & Stock Co.....	105
Bobbs-Merrill Co. v. Straus.....	109, 110
Booth & Co. v. Davis.....	106, 107
Bowman v. Chicago & N. Y. Ry. Co.....	42
Brock v. Northwestern Fuel Co.....	93

C.

Calderon v. Atlas Steamship Co.....	xvi
Caldwell v. North Carolina.....	42
Caledonian Coal Co. v. Baker.....	84
Canal Co. v. Railroad Co.....	xxvi
Chicago Coal Co. v. People.....	120
Chicago-Milwaukee Railroad v. Sabon.....	xvi
Cincinnati Packet Co. v. Bay	85, 104
City of Atlanta v. Chattanooga Foundry Co.....	101, 102
Clune v. United States.....	71
Commonwealth v. Miskey.....	120
Commonwealth v. Carlisle.....	120
Connolly v. Union Sewer Pipe Co.....	124, 125
Cook v. Marshall County.....	40
Crawford v. Neal.....	99
Cross v. Allen.....	99
Crutcher v. Kentucky.....	104

TABLE OF CASES.

D.	
	PAGE.
Dodge v. Tully.....	99
F.	
Field v. Barber Asphalt Co.....	86
Foppiano v. Speed.....	42, 43
G.	
Georgia Bank Co. v. Smith.....	86
General Electric Co. v. Wise.....	109
Gordon v. Guilford.....	100
Gulf, etc., R. R. Co. v. Ellis.....	53
H.	
Hadley Dean Plate Glass Co. v. Highland Glass Co.....	125
Hale v. Henkel	xxxi, 46, 47, 50, 51, 52, 54
Hall v. De Cuir.....	iv
Harp v. Choctaw Railroad	xxxiii, 77
Harriman v. Northern Securities Co.....	103
Houston & Texas Central Ry. Co. v. Mayes.....	44, 45
I.	
Interstate Com. Co. v. Southern Pacific Ry. Co.....	59
Interstate Com. Co. v. Lake Shore & Michigan Ry. Co.....	62
Interstate Com. Co. v. Chesapeake & Ohio R. R. Co....	xxxi, 63, 66, 67, 68, 96
Interstate Com. Co. v. Baird.....	85, 86
In re Hohorst.....	81
J.	
Jack v. Kansas.....	47, 48, 49
Johnson v. Southern Pacific Co.	xxxii, 96, 131, 132
K.	
Kehrer v. Stewart.....	45
King v. Morris.....	119
Knapp v. Lake Shore Ry. Co.....	73
L.	
Lafayette Bridge Co. v. City of Streator.....	126
Leisy v. Hardin	42
Leloup v. Port of Mobile.....	104
Lowe v. California State Federation of Labor.....	111, 113
Loewe v. Lawlor	83, 100
Lilienthal's Tobacco Co. v. United States.....	95
Loder v. Jayne.....	96

TABLE OF CASES.

M.

	PAGE.
McAllister v. Henkel	xxxi, 46, 47, 50, 51, 52, 54
McCall v. Cincinnati, Indianapolis, etc., Railroad	100
Metcalf v. Watertown	99
Mexican Nat. Railroad v. Davidson	98, 99
Minis v. United States	86
Minneapolis & St. Louis Railway v. Pontius	xxxviii
Missouri Pacific Railway v. Mackey	xxxviii
Munn v. Illinois	100
Montague v. Lowry	xxxii, 96

N.

Nat. Cotton Oil Co. v. Texas	121
Nester v. Continental Brewing Co.	120
New Haven R. R. Co. v. Interstate Com. Co.	63, 66, 67, 68
New Orleans v. Whitney	99
New York Ry. Co. v. Penn. Refining Co.	89
Norfolk & Western R. R. Co. v. Simms	42
Northern Securities Case	96, 97
Northern Securities Co. v. United States	xxiv, xxx, xxxii, 108

O.

Oman v. Bedford Bowling Green Stone Co.	xxxiii, 100, 114
----------------------------------------------	------------------

P.

Pabst Brewing Co. v. Cranshaw	44
Pennsylvania v. Wheeling Bridge Co.	116
People v. Fisher	120
People v. Sheldon	120
People v. The Milk Exchange	120
Phillips v. Iola Portland Cement Co.	107
Plant Investment Co. v. Jacksonville	99

R.

Railway Co. v. Gonzalez	81
Rhodes v. Iowa	42
Rice v. Standard Oil Co.	xxxiii, 96, 97
Rubber Tire Wheel Co. v. Milwaukee Rubber Works	111

S.

Santa Fe Pacific Ry. Co. v. Interstate Com. Co.	56, 59
Scribner v. Straus	110
Shoecraft v. Bloxham	99
Smiley v. Kansas	123
Southern California Ry. Co. v. Interstate Com. Co.	56, 59

TABLE OF CASES.

	PAGE.
Southern Pacific Co. <i>v.</i> Interstate Com. Co.....	56, 59, 61
State of Pennsylvania <i>v.</i> Wheeling Bridge Co.....	116
Swift <i>v.</i> United States	97, 103, 104
T.	
Tift <i>et al.</i> <i>v.</i> Southern R. R. Co.	x, 55, 82, 95
Tullis <i>v.</i> Lake Erie & Western Railroad	xxxviii
U.	
United States <i>ex rel.</i> Interstate Com. Co. <i>v.</i> Seaboard Railroad...	xvi
United States <i>ex rel.</i> Kingwood Coal Co. <i>v.</i> West Virginia R. R. Co.	78
United States <i>ex rel.</i> Greenbrier Coal & Coke Co. <i>v.</i> Norfolk Ry. Co.	79
United States <i>v.</i> Armour Packing Co. <i>et al.</i>	75
United States <i>v.</i> Astoria & Columbia River R. R. Co.....	63
United States <i>v.</i> Barr.....	116
United States <i>v.</i> Chicago, Burlington & Quincy Ry. Co.....	70
United States <i>v.</i> Chicago & Northwestern R. R. Co.....	62
United States <i>v.</i> Coolidge.....	116
United States <i>v.</i> Garlinghouse.....	117
United States <i>v.</i> Hudson & Goodwin.....	116
United States <i>v.</i> Lancaster.....	116
United States <i>v.</i> Southern Railway.....	132
United States <i>v.</i> Wiltberger.....	116
United States <i>v.</i> Worrall.....	116
V.	
Vance <i>v.</i> Vandercook Co. No. 1.....	42
W.	
Waters-Pierce Oil Co. <i>v.</i> Texas.....	121
West Virginia R. R. Co. <i>v.</i> United States <i>ex rel.</i> Kingwood Coal Co.	79
Western New York Ry. Co. <i>v.</i> Penn. Refining Co.	xxxiii, 90
Western Union Tel. Co. <i>v.</i> Pennsylvania Railroad.....	130, 131
Wheaton <i>v.</i> Peters.....	116
Whitwell <i>v.</i> Continental Tobacco Co.....	106

INTRODUCTION.

INTRODUCTION

The Fifty-ninth Congress, at its first session, in June, 1906, enacted legislation amending the Interstate Commerce Act and the Elkins Act, and conferring additional powers upon the Interstate Commerce Commission. The purpose of this legislation was to amplify and broaden the scope of the railroad legislation referred to, so as to protect the interests of the shipper and limit the power of the carrier. From an economic standpoint this new legislation marks an era in the history of the republic. It is the beginning of Federal control of the commerce of the country. It is a recognition by Congress of the inherent power which resides in the Federal government, to regulate and control interstate commerce, and of the obligation which rests upon the government to exercise this sovereign power.

It is a tremendous power. Commerce is one of the chief concerns of government, because it constitutes the life of the nation. "Whoever control the trade of the world," said Sir Walter Raleigh, "commands the riches of the world, and consequently the world itself." When, therefore, Congress, exercising the sovereignty conferred upon it by the Constitution, enacts into law wise and salutary rules for the government of the great transportation companies which operate the railways of the United States, it must, of necessity, exercise Federal control over the commerce of the nation, and thereby establish economic conditions of vital and far-reaching importance, which suggest new problems in industrial progress.

FEDERAL CONTROL.

The warrant for Federal control of interstate commerce is written plainly in the Constitution. The power to fix

rates and charges for transportation is an attribute of sovereignty, because in operating a public highway, a transportation corporation exercises the power of the sovereign. This power over public highways, constructed for public use, to accommodate public travel, and secure public convenience, is a matter of public concern and is absolutely essential to government. The sovereign cannot surrender this power, because, like the taxing power, the entire community has an interest in preserving it undiminished. Two sovereigns cannot exist in the same jurisdiction. One must be supreme, and the supreme power must, of necessity, be the Federal government. And so it was ordained when our fathers wrote into the Constitution the words declaring that that instrument and the laws made in pursuance thereof "shall be the supreme law of the land," and in express words subordinated the judiciary of the several States by declaring that "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The assumption, therefore, by the Federal government of this power to control interstate commerce is not an assumption of the power of the States, because this particular power does not reside in the States, but in the Federal government. Indeed, before Congress assumed to exercise this power by enacting the Interstate Commerce Act, Chief Justice WAITE, in 1877, speaking for the Supreme Court of the United States, declared that "State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."¹ This doctrine has always prevailed and must prevail, if Congress is to exercise its right to regulate interstate commerce.

RAILWAYS OF THE UNITED STATES.

Our unrivalled railway system, the finest in the world, is the growth of seventy-five years. In 1830 there were but twenty-three miles of railroad in operation in the United

¹ *Hall v. De Cuir*, 95 U. S. 485.

States. On January 1, 1906, the total trackage was 215,000 miles, exclusive of second, third, and fourth tracks, yards, and sidings. If these be included, the aggregate will be 300,000 miles of track. The circumference of the earth is but 25,000 miles. The mileage of railways in the United States embraces two-thirds of the railway mileage of the world. The capital of these transportation corporations is estimated at \$13,000,600,000. The aggregate value of their capital stock represents \$6,339,899,000, and, in 1905, their income from freight and passenger receipts reached the handsome total of \$5,500,000 per day. Some idea of the colossal proportions of the freight business alone may be learned from the fact that an increase of one mill per ton per mile, on the traffic for the year 1905, would produce \$174,522,089. They employ 1,600,000 men. Their disbursements include operating expenses, fixed charges, floating indebtedness, improvement of road bed, necessary repairs, and dividends which may be declared from time to time on the capital stock. The vast power, exercised by the carriers of the country, are controlled by a directorate, dominated, it is said, by about a hundred men.

The principal railways of the United States are under the control of seven great systems, as follows: (1) The Vanderbilt System;¹ (2) The Pennsylvania;² (3) The Gould System;³ (4) The Harriman Lines;⁴ (5) The Hill System;⁵

¹ Comprising New York Central; the Lake Shore & Michigan Southern; the Michigan Central; the Cleveland, Cincinnati, Chicago & St. Louis; the Pittsburg & Lake Erie, and the Erie Railway Company (formerly New York, Lake Erie & Western).

² Including the Pennsylvania, and controlling the Baltimore & Ohio; Chesapeake & Ohio; Norfolk & Western, and holding jointly with the New York Central a controlling interest in the Philadelphia & Reading, which latter controls the Central Railroad of New Jersey.

³ Comprising the Wabash; the Missouri Pacific; the St. Louis Iron Mountain & Southern; the Texas & Pacific; the St. Louis Southwestern; the International Great Northern; the Wheeling & Lake Erie; the West Virginia Central; the Denver & Rio Grande; the Western Maryland, and now constructing the Western Pacific.

⁴ Comprising the Union Pacific; Southern Pacific; Central Pacific; Oregon Short Line; Oregon Railway & Navigation Co., with large interests in the Illinois Central; the Chicago & Alton, and Kansas City Southern.

⁵ Including the Great Northern; the Northern Pacific. and the Chicago, Burlington & Quincy.

(6) The Rock Island System;¹ and (7) The Southern Railway System.²

These facts give force to the pertinent observation of Hon. JOHN F. DILLON, speaking of the danger of railway consolidation, "that uncontrolled power in a few men by any form of corporate device, to control the railway systems of a great country, is a power too great to be compatible with the public weal, and one which would not be permanently endured by the people."

RAILWAY LEGISLATION PRIOR TO 1906.

The first general law by which Congress assumed to exercise control of commerce among the States and with foreign nations was approved February 4, 1887, and is known as the Interstate Commerce Act. It embraced legislation affecting only common carriers, and was supplemented by the Sherman Act, approved July 2, 1890, which included not only common carriers, but manufacturers and producers. The Sherman Act prohibits contracts and agreements of every kind in restraint of trade and commerce. This legislation as to carriers was further supplemented by the Elkins Act, approved February 19, 1903. Two causes contributed to hinder efficient administration of this railway and anti-trust legislation. One was occasioned by the unavoidable delay in reaching the Supreme Court of the United States, as an appeal in the first instance was to the United States Circuit Court of Appeals. Another obstacle resulted from the difficulty of securing evidence to prosecute violations of the law. To obviate these difficulties Congress passed the Expediting Act of February 19, 1903, abolishing intermediate appeals to the Circuit Court of Appeals, when the government was a party, and authorizing an appeal directly to the Supreme Court, and giving cases so expedited a preference over all other litigation, except criminal causes. In order to compel witnesses to testify Congress passed several

¹ Including the Chicago, Rock Island & Pacific; the St. Louis & San Francisco; the Chicago & Eastern Illinois, and the Choctaw, Oklahoma & Gulf.

² This system controls nearly all the important railways of the South.

statutes, approved, respectively, February 11, 1893, February 14, 1903, February 19, 1903, and February 25, 1903, each containing an express provision making the testimony of the witness compulsory, and securing immunity to the person so testifying, by prohibiting any prosecution of the witness on account of any matter to which he might be compelled to testify, except perjury in giving the evidence.

Congress also provided a method of securing information through an investigating bureau, known as the Bureau of Corporations in the Department of Commerce and Labor, created by section 6 of the act approved February 14, 1903, giving the Commissioner power to investigate "the organization, conduct, and management of the business" of corporations or joint-stock companies engaged in interstate commerce. This legislation was designed to promote Federal control in the field of interstate commerce.

COMMUNITY OF INTEREST AMONG CARRIERS.

The Commerce Act, among other provisions, prohibited pooling among railroads in order to stimulate competition among carriers. The consolidation and merger of competing systems of railway has been condemned by the Supreme Court of the United States as contrary to law and public policy and in violation of the Sherman Act. Yet from official data in the records of the Interstate Commerce Commission, and from testimony taken before that body from time to time, it would seem that the railways of the United States are practically merged and operated under a sort of gentlemen's agreement, which substantially eliminates competition. Mr. Edward A. Moseley, secretary of the Commission, is authority for the statement that 65 per cent. of all the railroads in the country are so closely united as to amount to a practical community of interest; while the remaining 35 per cent. are absolutely dependent upon these great consolidations. "Competition," says Mr. Moseley, "between carriers by rail, which formerly prevailed and acted as a check or restraint against unreasonable rates, has been to a great extent suppressed and destroyed. As a result of these consolidations, the shipper

can no longer safely rely upon competition to insure rates reasonably low, and to prevent rates unreasonably high. The principal and powerful lines are now controlled by a few, whose common interests make it desirable and profitable to act in concert and refrain from competition."

Other objects sought to be secured by the Commerce Act originally, and by the legislation of 1906 amending it, were (1) to give to every shipper equality of opportunity, and prevent the carrier from charging one man more than another for transportation of property; (2) to forbid one carrying company to combine with another, so that there could be no merger of public highways, which could only result in eliminating competition, thus establishing a monopoly; (3) to compel a carrier to carry, and to prohibit it from engaging in any other business.

The Interstate Commerce Act was experimental legislation. Experience has shown that its provisions, even as amended by the Elkins Act and other supplemental legislation above referred to, failed to accomplish the benefits which it was designed to secure.

NEED OF SUPPLEMENTAL LEGISLATION.

One radical defect in the law was its failure to create a tribunal with power to fix rates and charges for transportation. When the act was passed the far-reaching consequences of conferring this sovereign power was ably discussed. Should it remain in the carrier? Should it be vested in a judicial tribunal or court, clothed with jurisdiction over this particular field, to be known as the Court of Interstate Commerce (Congress undoubtedly has power to create such a court), or should supervision be conferred upon an administrative or *quasi-judicial* body. The latter expedient was adopted and the Interstate Commerce Commission was created with certain specified powers and duties.

The Commission, however, prior to 1906, was not clothed with power to fix rates and charges for transportation. It could take testimony as to whether or not a given rate was reasonable, but if it found that the rate was unreasonable, it

had no power to prescribe what would be a reasonable rate in its stead. It could make orders commanding the carrier to cease and desist from practicing discrimination, or from continuing to charge an unreasonable rate, or to make reparation for losses sustained. But the orders were not obligatory until suit was brought by the Commission to enforce them. Pending the protracted delays which necessarily ensued, during which period the acts forbidden by the order were also prohibited by injunction, the discouraged shipper became exhausted. He found his business ruined by the acts complained of. He was helpless. As between carrier and shipper the latter was practically remediless.

Thus the carrier, with unlimited resources at its command, has been able to evade the law and defeat the beneficial provisions of the statute, by reason of the lack of power conferred upon the Interstate Commerce Commission.

RESULT OF CARRIER BEING DEALER.

But graver abuses than rebating and discrimination grew out of the practice of carriers engaging in business, and dealing in the commodities which they transport. Not only were shippers discriminated against and driven out of business by rivals, who, by means of secret rebates, could secure freight rates much lower than that paid by the competitor, but in many instances the rival and competitor of the helpless shipper was the carrier itself, who, contrary to public policy, was permitted to become a dealer in the very commodities it transported. A familiar instance of the evils resulting from the practice of the carrier engaging in business will be found in the mining regions of Pennsylvania and West Virginia, where the coal lands were largely absorbed and the coal business monopolized by the carrier. By mining and dealing in coal, the carrier, either directly or through subsidiary companies, found no difficulty in driving its competitors from the field by refusing them cars and facilities for transportation, and discriminating against them by secret rebates. The carrier was also the miner and shipper of coal, and in this dual capacity was enabled to establish a complete monopoly

and to control absolutely the price of the commodity to the consumer.

The carrier in the exercise of the tremendous power which attaches to the control of rates of transportation upon the public highways was able to make its own markets, and to establish its own market towns. Communities were destroyed because rates were made lower to certain points at greater distances than the rates given to localities situated nearer to the place of the origin of the shipment. This sort of discrimination frequently destroyed communities, and built up rival localities, and market points at the expense of those destroyed. In one instance (the *Tift* case¹) the carrier, under the guise of increased freight charges, took a *pro rata* share of the increased profits realized from the business of a prosperous shipper.

LEGISLATION OF 1906.

The President of the United States, Hon. THEODORE ROOSEVELT, carefully studied the conditions resulting from the criminal acts of the carriers, and the abuse of their great powers. He realized the difficulties attending the stupendous problem, and the far-reaching consequences of conferring upon some body or tribunal the rate-making power. He aroused public opinion to the importance of the subject, and the pressing need of a remedy for the evils complained of. In his annual message to Congress (December, 1905), he recommended that the power be vested in the Interstate Commerce Commission, in these memorable words:

"The Interstate Commerce Commission should be vested with the power, where a given rate has been challenged and after full hearing found to be unreasonable, to decide, subject to judicial review, what shall be a reasonable rate to take its place; the ruling of the Commission to take effect immediately and to obtain, unless and until it is reversed by the court of review."

Had this recommendation been enacted into law, the rights of the shipper would have been restored, and the power of

¹ *Tift v. Southern Ry. Co.*, 138 Fed. Rep. 753.

the carrier to exhaust and ruin the shipper by interminable delay, and to continue to grant rebates, and to exercise unreasonable discrimination in its own behalf, would have been materially checked. The carrier would have been obliged to obey an order made after a fair trial, and to carry, upon the terms and conditions prescribed in the act, and to treat all shippers, similarly situated, alike. The struggle which resulted in Congress over the rate regulation recommended by the President became memorable. One phase of it was the strenuous effort to prevent the rate, made by the Commission, from taking effect immediately. This effort was successful. The act, passed June 29, 1906, vested in the Interstate Commerce Commission power to fix a maximum rate, the order of the Commission to take effect "within such reasonable time, not less than thirty days, and continue in force for such period of time, not exceeding two years, as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

RESULTS ACHIEVED BY LEGISLATION OF 1906.

Nevertheless, great and lasting results were achieved by the legislation of 1906. The task of securing efficient remedial legislation was difficult. The law must be just. The carrier must have reasonable compensation for services rendered. The shipper must be protected absolutely from unjust discrimination by the carrier. One man must not be charged more than another for the same service. Facilities of shipment and instrumentalities of commerce, including switches and sidings, must be open to all, and none unjustly excluded from their use. A railroad is a public highway and cannot, in the nature of things, be operated as a private way so as to permit its use by those only who are chosen by the carrier. Such discrimination would make the highway private. In order to secure these ends, the following provisions, in addition to the power to fix rates, will be found in the new law:

The Commission is given power, not only to fix rates gen-

erally, but to prescribe joint through rates, and part rail and part water rates.

Carriers, that is railroad companies, as distinguished from pipe-line companies, are expressly forbidden to deal in the commodities they carry, other than timber and the manufactured products thereof. This provision is to go into effect May 1, 1908.

Private car lines, including those operating refrigerating and ventilating cars, express companies, and sleeping car companies are made common carriers. Pipe line companies, persons and corporations engaged in the transportation of oil or other commodities, except water, or natural or artificial gas who transport by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, are also declared to be common carriers.

Carriers must keep uniform books, which, at all times, shall be accessible to the Interstate Commerce Commission. All reports made by carriers to the Commission must be uniform.

Switches, sidings and terminal facilities may be ordered by the Commission, and may also be directed to be furnished by the court by writ of mandamus.

Damages sustained to goods sent over a joint through route shall be borne by the initial carrier.

An appeal from an order of the Commission fixing a rate, if sustained by the court below, must be taken directly to the Supreme Court of the United States, thus abolishing intermediate appeal.

AS TO FREE PASSES.

The law as to free passes, and free transportation, will require judicial interpretation. Congress in the Act approved June 29, 1906, enacted new legislation in this regard, but in so doing did not amend section 22 of the Commerce Act, which relates exclusively to the subject, but inserted the new legislation as part of section 1 of the Act. The amending Act declares "that all laws, and parts of laws in conflict with the provisions of" the Act of June 29, 1906, are repealed. So much, and such parts of section 22, therefore, as conflict

with the provisions of section 1, relating to free transportation, are repealed. But if the provisions of section 22 do not directly conflict with the provisions of section 1, in this respect, both sections must stand. Under section 22 carriers could handle or carry property for the United States, State or municipal governments free, or at reduced rates. There is nothing in section 1 which is inconsistent with this provision. Under section 22, however, free passes could lawfully be given, only to officers and employees of railroads; and the principal officers of any railroad company could exchange free passes or tickets "with other railroad companies for their officers and employees."

The class of persons to whom free passes may issue, after January 1, 1907, will be no longer confined to the officers and employees of a railroad company, but may include the officers and employees of any "common carriers," namely, the officers and employees of any oil company using pipe lines, any express company, sleeping car company, or railroad company, their families, *agents*, surgeons, physicians, and attorneys-at-law; and also "witnesses attending any legal investigation in which the common carrier is interested." To this class belongs also persons engaged in religious and charitable work.

A person transacting the business of a common carrier, or representing it in any capacity, is an agent of the carrier. Pipe line companies are engaged in refining and selling oil. Any person or corporation engaged in this business which does not use a pipe line, can not derive any benefit under the law which sanctions free transportation; but a competitor using pipe lines, could secure free transportation for its salesmen, employees, agents and attorneys. All salesmen or traveling agents of such persons or corporations, throughout the United States, would thus be enabled to carry on business free of charge, so far as transportation for these traveling agents is concerned. This exemption from charges for transportation, would give them an advantage in the market over a competitor, which would result in securing to the pipe line company a monopoly. Free transportation under such circumstances, would operate as a commercial weapon, equally as formida-

ble, as though the carrier gave the pipe line company substantial rebates aggregating thousands of dollars annually.

An attorney-at-law elected to the legislature, if he did any work for a common carrier, could ride on an annual pass. From this standpoint it would seem that all members of the legislature, State or Federal, who represent common carriers, could, if they chose, receive mileage from the public treasury, and ride on free passes issued to them by their clients. But to the legislator who is also the attorney for the carriers, this anomaly presents itself. As attorney he would be lawfully entitled to use the pass; its use by him as a legislator would be unlawful. If he desires to retain the pass, he must either relinquish his public office, or decline to act for the carrier in the exercise of his profession.

The first instance of the results to be anticipated from the operation of the new law, in this regard, arose in West Burlington, Iowa, where it happened that all the city officials were railroad employees and as such were entitled to passes. As municipal officers, they are prohibited from receiving free transportation. The passes being considered more valuable than the official positions, the pass-holders resigned their municipal offices, in order to avoid any controversy, which might arise as to their right to use the passes.

BILL OF LADING COMPULSORY.

One of the most important features of the legislation of 1906, is the provision contained in section 20, which makes it obligatory upon every common carrier not only to give the shipper a receipt or bill of lading, but which also forbids the carrier to seek to exempt itself from liability, by conditions, or limitations, which it may see fit to print upon the receipts or bills of lading which it issues. The statute expressly declares that the carrier "shall be liable to the lawful holder" of such receipt or bill of lading, "for any loss, damage or injury to such property caused by it," or by a connecting carrier, and provides expressly that "no contract, receipt, rule or regulation shall exempt such common carrier," from the liability imposed by the statute.

Any uniform bill of lading to be used by common carriers, must be free from the limitations and conditions usually contained in bills of lading and receipts devised for the purpose of relieving the carriers from liability. It is customary for the carrier, if the shipper insists, to offer two bills of lading or receipts, one of which acknowledges the receipt of the goods, to be carried to a certain place for a specific rate, and containing a printed stipulation relieving the carrier from all liability in case the goods are lost or destroyed. The carrier usually offers to transport the goods at a trifling reduction in cost of carriage in case such receipt is given. The ordinary bill of lading, however, usually contains specific exemption clauses, inserted for the benefit of the carrier.

In order to establish the carrier's liability, and protect the public from *uni-lateral* contracts containing conditions which must result in a law suit, in case the shipper seeks redress for property lost or destroyed, while in the custody of the carrier, Congress, under section 20 of the Commerce Act, has established a uniform rule governing bills of lading in all interstate transactions.

COASTWISE STEAMSHIPS AND CARRIERS BY WATER.

Owners of vessels, including coastwise steamships and vessels bound for foreign ports, are not within the Commerce Act, and are not bound by its provisions, unless they operate a railroad or a pipe-line in conjunction with the vessels. Such owners are common carriers by virtue of their employment. But the statute is made applicable only to carriers engaged in the transportation of passengers or property, "wholly by railroad, or partly by railroad and partly by water when *both* are used under a common control, management, or arrangement for a continuous carriage or shipment." In defining these words, the courts have held that an agreement among carriers to transport property over a number of lines, at a fixed through rate, and agree among themselves expressly, or by implication to a division of the charges, such a transaction will constitute "a common ar-

rangement for a continuous carriage or shipment" within the meaning of the statute.¹

Carriers by water, however, who are not within the statute, so far as the conditions in bills of lading are concerned, are governed by the provisions of an act approved February 13, 1893, known as the Harter Act, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights, in connection with the carriage of property." This statute forbids the insertion of clauses in bills of lading or receipts purporting to relieve the carrier from liability, and limits the liability of carriers "transporting merchandise or property to or from any port of the United States of America," upon certain conditions.

Except as modified by statute, there is no distinction between the liability of a carrier by land and a carrier by water. Both are common carriers by virtue of their employment, and whenever they undertake such employment their liability attaches. In the case of a carrier by water, who receives no franchise, and conducts business in an enrolled or licensed vessel, plying the ocean, which is the great highway of nations, his liability and the liability of his vessel attaches when the lien for freight attaches. Under a contract of affreightment the ship and cargo have reciprocal rights, each having a lien against the other to enforce these rights. The elements of such a contract are that the ship is seaworthy, including competent officers and crew, and properly provisioned, in order to carry and deliver the cargo, and to properly navigate the ship without needless delay or deviation. The rule defining a ship-owner's liability is clearly stated by Mr. Justice BROWN² as follows:

"Any contract by which a common carrier of goods or passengers, undertakes to exempt himself from all responsibility for loss or damage, arising from the negligence of himself or servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending

¹*U. S. ex rel. Interstate Com. Co. v. Seaboard Railroad*, 82 Fed. R. 563.

²*Calderon v. Atlas Steamship Company*, 170 U. S. 272, citing from *Chicago, Milwaukee Railway v. Sabon*, 169 U. S. 133

to defeat the fundamental principle upon which the law of common carriers was established."

This fundamental principle, referred to by Mr. Justice Brown, is, that every common carrier, by reason of the nature of his employment, is liable to the shipper for every misfortune, save only the act of God, and the public enemy. The carrier can not relieve himself from such liability unless by an express contract based upon a valuable consideration moving to the shipper. A bill of lading is a *uni-lateral* contract, and in maritime law differs materially from a charter party, which is in the nature of a lease of the vessel and must be signed by both parties.

Under the Harter Act, above referred to, clauses in bills of lading given by the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, purporting to relieve the carrier from liability from negligence are prohibited. In like manner also, carriers are forbidden to insert clauses in bills of lading purporting to relieve them from liability for failure "to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy, and capable of performing her intended voyage," or to relieve from liability for failure "to carefully handle and stow her cargo, and to care for and properly deliver same." The Harter Act, section 3, also limits the liability of carriers transporting merchandise to or from ports in the United States, as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insuffi-

ciency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

IMPRISONMENT PENALTY.

Failure to restore the imprisonment penalty, as it existed originally in the Commerce Act, constitutes also, a notable defect in the legislation of 1906.

The efficiency of the act was greatly impaired by abolishing this penalty. This was accomplished by the Elkins Act, approved February 19, 1903, which declared that "no penalty shall be imposed on the convicted party other than the fine prescribed by law; *imprisonment, wherever now prescribed as part of the penalty being hereby abolished.*" This provision was made expressly applicable to the Commerce Act, to which the Elkins Act was a supplement, and rendered the Commerce Act practically harmless. The latter act, as originally passed, made imprisonment the penalty for any and every violation of its provisions. Section 6 of the act declared that a writ of mandamus should issue to compel the carrier to file schedules of its rates and tariffs, and provided that failure to comply with the writ might be punished as a contempt of court. Under contempt proceedings the court has power to imprison the offender as part of the penalty imposed. Section 10 declared that any one guilty of "an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property" should be liable to imprisonment in addition to the fine prescribed, for a term not exceeding two years, or to both fine and imprisonment, in the discretion of the court. Section 10 further provided that any one guilty of aiding a shipper to obtain transportation for property at less than the published rate, which was declared to be the *only* legal rate, "by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means," was guilty of a misdemeanor,

punishable by either fine or imprisonment, or by both fine and imprisonment, in the discretion of the court.

These penal provisions rendered the Commerce Act available as a partial remedy for the evils it was designed to correct, notwithstanding the many difficulties attending its enforcement. But when these penalties, which would deprive the offender of liberty, were eliminated, the act became of practically little value. Convictions under it were rare and the cash fine for which the offender became liable, in case he was obliged to pay, still left large profits to the credit of the trusts and combinations who succeeded in getting rates which destroyed competition and eliminated the competitor as a rival in the commercial world.

IMPRISONMENT PENALTY FOR REBATING.

The imprisonment penalty has not been restored by the Act of June 29, 1906, except in so far as relates to the crime of rebating. One who knowingly accepts or receives any "rebate, concession, or discrimination" may, in addition to the fine imposed, be punished by imprisonment in the penitentiary for a term of two years, or by both fine and imprisonment, in the discretion of the court. To this extent the punishment by imprisonment has been incorporated in the Elkins Act, and restored to the Commerce Act. The language of the amendment in this regard, however, is so framed that it will be impossible to make it applicable to false billing, false classification, false weighing, or false reports of weight, or for failure on the part of the carrier to comply with the provisions relating to filing and posting schedules of rates and tariffs, and keeping the same posted; or for giving free passes, or free transportation. In this connection the conclusion is warranted that it was not the intention of Congress to restore the imprisonment penalty to the Commerce Act, and to incorporate such penalty in the Elkins Act. The argument is unanswerable that, if such had been the intention of the Legislature, it would have simply re-enacted section 10 of

the Commerce Act to read as it was enacted originally, in addition to the amendment of section 1 of the Elkins Act, and also to have declared that failure to comply with the requirements of a writ of mandamus, should be punishable as for a contempt of court.

The court, doubtless, has power to impose such remedy where a mandamus issues, as the writ is a direct mandate issued by the court. But no question on this point could possibly arise had the original provisions of the statute been restored.

RAILWAYS NOT TO ENGAGE IN BUSINESS.

The legislation which declares that railroad companies, after May 1, 1908, shall cease to mine and sell coal or any other commodity manufactured, mined, or produced by the carrier, or under its authority, or in which it may own, in whole or in part, or in any way have any interest, direct or indirect, other than timber and the manufactured products thereof, will create a commercial revolution. It means that the carrier may, perhaps, remain in the lumber business in addition to performing its public duties as carrier, but other commercial enterprises of every nature can no longer be lawfully carried on by them. Congress, in enacting this legislation, assumed that sound public policy required that the carrier must give its undivided attention to the performance of those public duties which it is chartered to perform. If the carrier should be permitted to engage in any private business, as a manufacturer and dealer in commodities, which commodities it must also carry, it must compete with its own customers, who are obliged to patronize it as shippers. It is obvious that the carrier cannot, as a dealer, enter into successful competition with its shippers, who are also dealers, without discriminating against them in the matter of rates and in furnishing facilities for transportation. The public duty of the carrier, comes directly in conflict with the private interest of the carrier in its capacity as dealer. The public duty and the private interest are incompatible and repugnant to each other. Both relations cannot be sustained simultaneously by the carrier. Either the public duty must yield

to private interest, or there can be no successful competition, in this regard, with rivals in the same line of business.

When the carrier is also a dealer, the fact that it carries its own goods in competition with those shipped by a competitor would ordinarily be *prima facie* evidence that discrimination has been practiced against the rival, because the carrier has the absolute power to transport its goods at actual cost of freightage.

The result of the practice of carriers engaging also in private business, which does not involve a public duty, has resulted in creating monopolies, giving them control of many commodities, notably of oil, beef, sugar, coffee, salt, iron ore, and coal. In the States of Pennsylvania and West Virginia the carriers are engaged in mining and shipping coal, and are the principal dealers in that commodity. In Pennsylvania they have conducted this business in defiance of the Constitution of the State, which expressly forbids the carrier to engage in the business of mining and selling that commodity, or engaging in any business other than that for which it was chartered. The provisions of the Constitution, adopted in 1874, in this regard, are as follows:

“No incorporation company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufacturies on its railroad or canal, not exceeding fifty miles in length.” Const., Art. 17, § 5.

“No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take and hold any real estate except such as may be necessary and proper for its legitimate business.” Const., Art. 16, § 5.

But notwithstanding this constitutional prohibition the railroads which penetrate the coal regions of Pennsylvania, control the business and fix the price, from time to time, of that prime necessity of life.

Now that Congress has directed the railroads to abandon the coal business, in so far as it relates to interstate commerce, can they justly complain, in view of the fact that they have carried it on for more than thirty years in direct violation of the Constitution of Pennsylvania, and the laws of the Commonwealth? Is it "commercial lynch law" on the part of the government to prohibit the practice, or is it not rather "commercial lynch law" on the part of the carrier to continue the business in defiance of law?

COAL PROPERTIES CONTROLLED BY CARRIERS.

The anthracite coal properties of the carriers in Pennsylvania are exceedingly valuable, worth hundreds of millions of dollars.¹ In order to obey the law, therefore, the railroads must shift the ownership of these properties, let go the profits of the business, the control of the coal trade, and the power to control the output of the mines, and the price to the consumer. Will this change work legal injustice? On the contrary, the carriers and their stockholders will be benefitted, because the railroads will continue to carry the coal as they always did, but they will get the tariff rates of freight on every ton transported, and this will inure to the benefit of the stockholders, because the rebates which formerly found their way into the pockets of the subsidiary companies, controlled by the carriers, being no longer diverted, will flow directly into the treasury of the railroad company and will materially increase the earnings of the carrier. The merchant can once more engage in the coal business, because his principal rival and competitor, the railroad, acting in the

¹ Their value can be estimated by reference to the amount of bonds, stock and certificates of indebtedness issued by the holding companies, having custody of the various properties held by them as representatives of the carriers. The *Philadelphia North American*, in July, 1906, published a summary of these values, as follows:

The Reading, represented by the Philadelphia & Reading
Coal & Iron Co.:

Capital stock of holding company	\$8,000,000
Sinking fund loan	1,320,000
Reading Co. advance	79,135,760
	<hr/>
	\$88,455,760
	<hr/>

interest of its subordinate corporations, can no longer destroy his business by discriminating against him, either as to rates, or as to furnishing cars, or as to the use of terminal facilities. The net result will benefit the stockholder of the carrier by directly increasing its earning capacity. It will benefit the public and the consumer by destroying the coal monopoly. It will open the entire field of mining and selling coal to any capitalist or operator who may choose to engage in the business; develop new properties, and open new mines and new industries, and give the commercial world an impetus not dreamed of under present conditions.

The value of these coal lands, however, is too great to permit of the presumption that the carrier will divorce absolutely the business of carrier from that of miner and dealer, until they have received from the Supreme Court of the United States an interpretation of the statute. Some may seek to accomplish indirectly that which they cannot

The Lehigh Valley, represented by Cox Brothers & Co.:	
Purchase-money bonds	\$19,000,000
Lehigh Valley Coal Co. stock	1,965,000
Lehigh Valley Coal Co. bonds	12,968,000
Lehigh Valley Coal Co. certificates of indebtedness to railroad company	10,537,000
	<hr/> \$44,470,000 <hr/>
The Erie, represented by Pennsylvania Coal properties,	
cost	\$37,000,000
Hillsdale Coal & Iron Co., stock	1,000,000
Blossburg Coal Co., stock	1,000,000
	<hr/> \$39,000,000 <hr/>
The New Jersey Central, represented by Lehigh & Wilkes-	
barre Coal Co.:	
Capital stock of holding company	\$9,212,500
Lehigh & Wilkesbarre Coal Co., bonds	26,053,339
	<hr/> \$35,265,839 <hr/>
The Delaware & Lackawanna R. R. owns directly its coal	
companies, claims right under its charter:	
Estimated value of Anthracite properties	\$25,000,000
	<hr/>
The Delaware & Hudson, claims same as Lackawanna:	
Estimated value of unmined coal	\$12,600,000
Coal department equipment, mining plant and advances.	2,500,000
	<hr/> \$15,100,000 <hr/>

lawfully do directly. The language of the prohibition is that the carrier shall not have any interest in business other than that of carrier, either "direct or indirect." How far the language of ancient charters will serve in this connection remains to be seen. If a holding company is formed to take over the coal properties of the carrier, will the transaction be held to be within the statute, as was the case of the holding company, which was resorted to, as a device to evade the provisions of the Sherman Act, in the Northern Securities case.¹ That transaction was an attempt to consolidate the property of carriers, to be operated by carriers.

Some of the carriers have declared that they purposed to abandon the business of miner and dealer in coal. In July, 1906, a corporation was organized with a capital of \$8,000,000, known as the Pennsylvania, Beech Creek and Eastern Coal Company. This company was created for the purpose of mining and selling bituminous coal. It has negotiated for the control of a number of properties heretofore operated in the interest of the carriers, and has acquired, under a 999 year lease, mining properties from the Pennsylvania Coal and Coke Company, the Webster Coal and Coke Company, and the North River Coal and Wharf Company.

The Ontario & Western:	
Elk Hill Coal & Iron Co. bonds	\$5,375,000
Scranton Coal Co. bonds	3,020,000
	<hr/>
	\$8,395,000
	<hr/>
The Lehigh Coal & Navigation Company claims an investment in anthracite property of	
	\$500,000,000
	<hr/>
Valued on basis of Delaware & Hudson basis, the value of the investment would be \$35,000,000; on Reading basis, the value would be about half that amount.	
The Pennsylvania R. R. Co., represented by Susquehanna Coal Co.:	
Susquehanna Coal Co. stock	\$2,136,800
Susquehanna Coal Co. bonds	1,355,000
Manor Hill, real estate, stock and bonds	2,250,000
Stock of other minor companies	125,000
	<hr/>
	\$5,866,800
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¹ *Northern Securities Co. v. United States*, 193 U. S. 197.

POWER OF VISITATION AND SUPERVISION.

Of far-reaching importance also are the amendments to section 20 of the Commerce Act. If the requirements of this section, as amended, are faithfully complied with, evidence as to how the business of the carrier is conducted, the amount of its gross earnings, and its net earnings, the detail of its receipts and expenditures, in what manner soever received or incurred, will be preserved in convenient form, readily accessible to the government as well as to the stockholder and the general public. These details and official data, including reports of all accidents, are required to be put in the form of reports, which, when filed, become official documents and may be used in evidence in any Federal court.

In requiring the carrier to furnish these minute details of all interstate business the government exercises the power to visit the corporation engaged in such business, which power is inherent in the sovereign and has always existed among civilized nations. Speaking of this power, Sir WILLIAM BLACKSTONE, the most distinguished commentator of the common law of England, observes that "the general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder."

In this terse sentence BLACKSTONE has admirably stated the reason and philosophy which underlies the rule of law giving to the founder of every corporation power to visit it. Corporations, though artificial bodies, are composed of individuals, and like individuals are subject to human frailties and are liable to abuse their powers and franchises and deviate from the performance of those duties with which they have been entrusted, and in the exercise of which carrying corporations exercise the attributes of sovereignty. The sovereign, therefore, as founder has wisely provided proper persons to visit, inquire into, and correct all irregularities that arise, and for which the corporation is responsible.

At the common law the king was the founder of all civil corporations, and his prerogative in regard to the power of

visitation was exercised through his majesty's Court of King's Bench. The power of visitation includes the right to inflict the extreme penalty of civil death upon the corporation by a decree dissolving it. Forfeiture of a corporate charter might be for negligence or abuse of its franchises in which cases "the law judges that the body politic has broken the condition upon which it was incorporated." The same principle applies in the United States to corporations created by an act of the Legislature.¹ Of these the founder is the Commonwealth.

Strictly speaking the Federal government is not the founder of corporations chartered under State laws. Few of them have Federal charters.² But the fact that a carrying company receives its franchise from the State is not material because, when the carrier assumes to exercise its franchise in connection with interstate commerce, it can do so only in subordination to the power of Congress to regulate such commerce. The carrier when doing interstate business becomes subject to a dual sovereignty, and the Federal government possesses the same right to compel obedience to Federal laws, as the State has to enforce obedience to its laws with respect to domestic or internal commerce, within the borders of the State. The power of the Federal government in respect to an act of Congress relating to interstate commerce is supreme, and may be exercised as if the corporation were chartered by Federal authority.

The power of Congress, therefore, to regulate interstate commerce includes the power to create a body with inquisitorial powers which are analogous to the power of visitation exercised in England by the crown through the Court of King's Bench as founder of all corporations receiving char-

¹ *Canal Co. v. Railroad Co.*, 4 Gill & Johns.

² The Union Pacific Railroad received aid and grants of land from the United States. Congress has declared that the books, records, and correspondence, and all other documents of the company "shall at all times be open to inspection by the Secretary of the Treasury, or such persons as he may delegate" and has forbidden the company to declare dividends other than from net earnings, or to issue new stock or securities of any kind without leave of Congress, except to fund its debt then existing. U. S. Rev. Stat., Sec. 5256, Act March 3, 1873, Chap. 226, Sec. 4.

ters from the king or the Parliament. In the case of national banks, this power is conferred upon the banking department and is exercised through the bank examiner. As to carriers the power is vested in the Interstate Commerce Commission supplemented by the aid of the Bureau of Corporations in the Department of Commerce and Labor.

RECORDS OF CARRIER MUST BE UNIFORM.

Under section 20 of the Commerce Act the Commission has power to prescribe the form of all accounts, records, and memoranda to be kept by carriers, including details as to the movement of traffic and of all receipts and expenditures. The carrier is forbidden to keep any accounts other than those prescribed by the Commission. False entries in books and records, the mutilation of books or records, falsification of any records, failure to keep true and correct books or correct entries, or to keep books or accounts other than those prescribed by the Commission, or a refusal to submit them to the examiner for inspection is declared to be a misdemeanor. The Commission may employ special agents or examiners, to examine all records of the carrier, with power to administer oaths, examine witnesses, and receive evidence.

The primary objects of the Commerce Act, as has been observed, is to abolish rebates, false billing, false weights, false classification of freights, and all sorts of discrimination. The object of requiring but one set of books was to render accessible evidence of any violations of law in this respect, upon the theory that with all books open to the inspection of a government expert examiner, it would be well-nigh impossible to conceal such violations, as a record of every transaction must be kept; and to alter, mutilate, or conceal any entry is declared to be a crime.

The carrier, in the absence of these requirements, might be able to baffle an investigation of its affairs through an ingenious system of bookkeeping. What part of the disbursements of the carrier should be charged to capital account? How is the stockholder to know, or how is the shipper to know, or how is the Commission to know what constitutes

a reasonable rate for freight charges, if income which should be used for operating expenses is used for something else? Expenses which should be charged to capital account might be charged to operating expenses, or might be credited to a fund used to liquidate damage suits incurred by the carrier in killing and maiming passengers and employees, for thousands are killed and maimed by the carrier every year.

The bookkeeping problem also bears directly upon the accuracy of schedules of rates and charges, required to be kept and posted, so that rebates cannot be hidden by manipulating these schedules, as has been done frequently and successfully. Mr. ALPHEUS B. STICKNEY, President of the Chicago and Great Western railroad, is perhaps as well qualified as any one to enlighten the public on this phase of the railroad problem. Mr. STICKNEY heartily approves of a rigid compliance with the requirements of the Commerce Act in this regard.

"In order to furnish this information," says Mr. STICKNEY, "the tariffs must be published in such a way that a man of ordinary understanding can tell what the rate is. Now the tariffs are published in a private cipher, which no one save the expert clerk who has immediate charge of this business can understand. The tariff managers and the freight agents cannot find the rates in their tariffs. Every officer must have what is called a tariff clerk who keeps track of the tariff amendments, and when it is desired to know what the rate is, he is called upon for information.

"As an illustration, suppose a tariff is made upon a certain commodity. The tariff is modified by an amendment. Another amendment may follow. Then a circular will be issued which further modifies the rate. Thus the stream of schedules grows in volume until there are more than 2,500,000 tariffs filed in the office of the Interstate Commerce Commission.

"An example of the effect of the modification of tariffs is found in the way in which the Standard Oil Company secured lower rates for its shipments from Whiting, Ind., to East St. Louis, than did its independent competitors. The

railroads in Illinois published a tariff between Chicago and East St. Louis, both places being within the State. Then they published a little circular saying the rates between Chicago and East St. Louis applied between Whiting, Ind., and East St. Louis. This circular was filed with the Interstate Commerce Commission. Nobody knew what it meant. The Illinois tariff contained some very low rates on oil and its products. The circular was sent to the Standard, and it secured the advantage through the ignorance of its rivals."

The recommendation of Mr. STICKNEY to cure this evil, was a suggestion that the Commission should refuse to permit amendments to schedules, or permit them to be filed. As it would be impossible to go around to every station and change the tariffs to conform to the amendment, the only practical way is to reprint the whole tariff, and let the carrier give more permanency to its rates, to prevent constant changes, in order that a shipper may be reasonably certain what freight rates will be when he intends to ship goods to be manufactured, perhaps six months after he receives an order for them.

APPRAISAL OF RAILROAD PROPERTY.

The inquisitorial power now conferred upon the Interstate Commerce Commission, under section 20, coupled with the duty imposed upon it by section 15 of the Commerce Act, which requires that body to fix rates and charges of transportation, and "to determine and prescribe what will be the just and reasonable rate," is broad enough, it would seem, to enable the Commission to appraise and value the railroad properties of the United States. Indeed, this task has been assumed, and Professor HENRY C. ADAMS, the statistician of the Commission, has been selected by it to aid in that delicate and important duty, by far the most important phase of the railroad problem. In order to fix the amount of rates and charges, it is essential to ascertain the amount of capital actually invested in constructing, equipping, and operating the railway. A rate to be just must yield a fair return on the capital invested. How much capital has been invested? From official data

gathered by the Commission, from time to time, the carriers claim that the railroads of the United States are capitalized at about \$13,000,000,000, and are worth that amount. How much of this vast sum represents money actually invested; how much is based upon no consideration whatever, and represents what is ordinarily designated as water? It is a matter of common knowledge that mergers and reorganizations of railroad properties usually result in large bonuses, represented by stock, and sometimes bonds, issued by the new corporation, which are merely gifts. But they find their way into the hands of innocent holders. Upon these fictitious securities the carrier must pay dividends, which must be taken from the earnings, and these earnings represent the money which is paid for freight and transportation by merchants and the traveling public. An illustration of the vast amount of securities of this character will be revealed by an examination of the Northern Securities case,¹ in which the defendants sought, by a merger agreement, to consolidate competing lines of railway between the Great Lakes and the Pacific ocean. Had the transaction been legalized, the projectors of the plan would have received \$122,000,000 of watered stock. The earnings of the consolidated companies was the only source from which the money could be realized with which to pay the dividends, not only on the capital actually invested in the properties, but in addition, upon the \$122,000,000 which was issued as a bonus to members of the syndicate. The payment of these dividends, therefore, would have cast an additional burden upon the shipper and consumer, for there is and can be no other source from which the revenues of the carrier can be derived with which to pay them.

In justice to the shipper and consumer, it is obvious, that a reasonable rate of transportation of persons and property must be based on knowledge of the amount of capital invested in railway properties. This fact, when known, will form the only true basis upon which to estimate what will be a just and fair compensation to the carrier in return for the services it renders.

¹ *Northern Securities Co. v. United States*, 193 U. S. 197.

But, notwithstanding its manifold defects, the railway legislation of 1906 will shed new lustre on the administration of Mr. ROOSEVELT, who is entitled to the credit of its enactment, and will add to his great reputation.

THE CHESAPEAKE AND OHIO CASE AND TOBACCO TRUST
DECISIONS.

The efficiency of railroad and anti-trust legislation has been immeasurably strengthened by two notable decisions made by the Supreme Court of the United States in February, 1906, a short time previous to the legislation amending the Commerce Act and the Elkins Act. These deliverances were made in what are known as the Chesapeake and Ohio case,¹ and the Tobacco Trust cases.² In the former the court established two new principles; first, as to the rule of construction to be applied in administering the Commerce Act; second, the wholesome doctrine, that to permit a carrier to engage in business other than that of carrier in commodities transported by it, is contrary to public policy, and that contracts in violation of that rule, entered into by carriers, are void. This principle has been enacted into law, and is embodied in section 1 of the Commerce Act by the act approved June 29, 1906.

The rule of construction is based upon the assumption that the Commerce Act, when invoked in civil actions or when injunctive relief is sought, is remedial and not penal legislation. Aside from its penal aspect, it is a remedial statute, and should be construed and interpreted liberally to secure the beneficial purposes for which it was designed, and in aid of those for whose benefit the law was enacted. In this connection Mr. Justice WHITE, speaking for every member of the court, said:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by

¹ *Interstate Com. Co. v. Chesapeake & Ohio R. R. Co.*, 200 U. S. 281.

² *Hale v. Henkel*, 201 U. S. 43; *McAllister v. Henkel*, 201 U. S. 61.

requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute is remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

This rule of construction is applicable also to the Sherman Act, in view of the decisions of the Supreme Court in the *Northern Securities case*,¹ the *Addyston Pipe case*,² the *Montague case*,³ and in the *Johnson case*,⁴ all brought under the Sherman Act except the last named. In the authority first cited the court went to the merits of the controversy, disregarding entirely technical objections. It revealed the heart of the conspiracy charged, and declared that the holding company was created to take over the stock of the competing lines of railway comprised in the merger, thus creating a monopoly, which extinguished competition in the transportation of persons and property from the Great Lakes to the Pacific ocean, and that the holding company was a mere device to cover the unlawful combination. It was a scheme by which the parties sought to do by indirection that which was directly and expressly forbidden. The court considered the Sherman Act a remedial statute, in applying the remedy which it was designed to secure. It considered the real nature of the transaction which resulted in the merger and inquired into the purposes sought to be accomplished thereby. The same thing can be said of the *Addyston Pipe case* and the *Montague case*.

In the *Johnson case* the court construed the Safety Appliance Law, approved March 2, 1893, which was enacted to promote the safety of employees and travelers upon railroads. The carrier claimed that it was a penal statute and must be strictly construed. The Supreme Court refused to adopt this view. On this point, the court, by Chief Justice

¹ *Northern Securities Co. v. United States*, 193 U. S. 197.

² *Addyston Pipe Co. v. United States*, 175 U. S. 211.

³ *Montague v. Lowry*, 193 U. S. 35.

⁴ *Johnson v. Southern Pacific R. R. Co.*, 196 U. S. 1.

FULLER, reversing the Circuit Court of Appeals, said that the object of the Legislature in enacting the law was to protect the lives and limbs of employees and passengers. The legislative intent was to promote the public welfare and secure safety. The evil sought to be remedied was the risk arising from the necessity of going between cars in coupling and uncoupling them; and that while with respect to suits to recover the penalties and forfeitures provided by the act, it might be construed as penal, yet where it was invoked to secure the remedy, it was a remedial statute. "The design to give relief," said the chief justice, "was more dominant than to inflict punishment."

The value of this rule of construction is apparent, in view of the cases in which the shipper has been defeated in the attempt to secure the benefits which the law was designed to secure to him. The ruling of the lower courts, in some cases, was based upon a narrow and technical construction of the statute. The shipper was defeated and thrown out of court upon technicalities, and the merits of his case were lost sight of in order to promote some technical rule which could not fairly be said to have misled any one. Notably in the *Rice* case,¹ brought by merchants to recover damages under the Sherman Act, and the case of the *Penn Refining Company*,² brought by shippers to recover damages sustained by the act of the carrier in granting rebates in violation of section 2 of the Commerce Act.

Had the construction been given to this remedial legislation, which the Supreme Court indicated should be given to it, in the cases above referred to, a different result might possibly have been reached in those cases, and also in the *Harp* case,³ and the *Oman* case,⁴ where the shipper sought to compel the carrier to carry, and afford him the same use of tracks, cars, and terminal facilities which it was claimed were employed by other shippers similarly situated.

¹ *Rice v. Standard Oil Co.*, 134 Fed. Rep. 464.

² *Western New York R. R. Co. v. Penn. Refining Co.*, 137 Fed. Rep. 343.

³ *Harp v. Choctaw R. R. Co.*, 125 Fed. Rep. 445.

⁴ *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. Rep. 64.

THE TOBACCO TRUST CASES.

Of equal importance is the decision of the Supreme Court in the Tobacco Trust cases, and its bearing upon the efficiency of anti-trust legislation cannot be overestimated. Credit for the results achieved in this most important litigation is especially due to Mr. HENRY W. TAFT, special counsel for the government, whose ability and learning in the conduct of the proceeding materially contributed toward securing a construction as to the limitation and scope of the Fourth and Fifth Amendments to the Constitution, involving questions decided by the Supreme Court for the first time in its history.

"The decisions in the Hale and McAllister cases," says Mr. TAFT,¹ "have placed in the hands of the government a potent weapon to compel obedience to the law. How it shall be used will largely depend upon the attitude of the trusts themselves. A just and wise enforcement of the commerce laws did not require an immediate resort to criminal remedies; and circumstances may still exist where the policy of the law may be effectively carried out by means of injunctive relief. The commerce laws deal with a regulation of interstate trade entirely new a generation ago. Business dealings which had before been regarded as justifiable, both in morals and law, became in a day *mala prohibita*. Multitudes of transactions which had not been, in their general effect, injurious to trade, were declared to be illegal, not because they were intrinsically immoral or even, under ordinary conditions, in violation of wise economic principles, but because they enabled powerful corporations, by an aggregation of an immense amount of capital, to oppress and ultimately to exterminate the less powerful. It was a serious matter to prohibit by law methods of business which had prevailed for many years; and the immediate and drastic enforcement of such a law, a reasonable public opinion would neither have demanded nor tolerated. It has taken years to establish the principles upon which it must be determined what constitutes a combination in restraint of interstate

¹ Article in Columbia Law Review, June, 1906.

trade which is prohibited by the commerce acts. But they are now so far settled that little excuse will hereafter be afforded to a person or corporation for pleading ignorance of them; and there can be no complaint of hardship if, for violations of the law in clear cases, criminal penalties should be vigorously imposed."

The Supreme Court, in the cases referred to, disposed of the notion that a corporation could enter into conspiracies in restraint of trade and commerce, in violation of the express provisions of an act of Congress, and then escape the penalty for its acts by refusing, when subpoenaed, to give any evidence upon which a conviction could be based. In other words, it was claimed that the Fifth Amendment threw about the criminal conduct of corporations an almost impenetrable veil, for if the agents and servants of the corporation could refuse, under subpoena, to answer questions before the grand jury, both they and the corporation would escape punishment, and the law seeking to punish them would become a dead letter. Furthermore, evidence of criminal conspiracy is sometimes clearly revealed in the books of the corporation; and in order to withhold the evidence they contained, the tobacco corporations invoked the aid of the Fourth Amendment, which forbids unreasonable searches and seizures. Had this contention prevailed, corporations engaged in criminal conspiracies in violation of the Commerce Act or the Sherman Act, or any other law which Congress might pass, would, probably, be able to nullify them. No indictment, as a rule, could be found for the crimes which Congress sought to punish, and no convictions could be had even if indictments were found.

In addition to these important principles the court also decided that a grand jury had power, without making a specific charge against any particular person, to conduct an inquisitorial proceeding, examining witnesses, and demanding the production of documentary evidence, with a view to determine *whether* there has been a violation of law, and, if so, *who* committed it. The power of the grand jury upon such an investigation is, of course, greatly aided by the

immunity provisions contained in the statutes, which, while they render immune the officer or employees of a corporation, do not permit such officer or employee to assert the privilege against incrimination in behalf of the corporation or of any fellow officer or employee.

The decision in the Tobacco Trust cases has overthrown the contention of the corporations, that no law can reach them because their conduct is rendered immune by the Fourth and Fifth Amendments. The Supreme Court has said that the Fifth Amendment does not extend to a corporation at all, and that, while the unreasonable search and seizure prohibited in the Fourth Amendment applies to search and seizure without warrant of law and in the absence of a subpoena or other lawful mandate, a Federal court has power, in any proceeding authorized by law to issue its subpoena or appropriate writ, commanding a corporation or an individual or an officer or agent of the corporation, to appear before a grand jury or before a petit jury and produce its books for inspection, and that books produced in obedience to such legal mandate are not unlawfully seized or searched within the meaning of the Fourth Amendment.

The result is that the Sherman Act and the Commerce Act are enforceable. Counsel will be compelled to resort to some new device to defeat them. They cannot be evaded by invoking, as a refuge the Fourth and Fifth Amendments to the Constitution.

EMPLOYER'S LIABILITY BILL.

The first session of the Fifty-ninth Congress has made longer strides in the field of economic legislation than that of any Congress in history. The Interstate Commerce Act and the Sherman Act were aimed at monopolies and trusts, having for their object the establishment through diverse forms of discrimination, of exclusive commercialism, and exclusive commercialism may be said to be economic anarchy. The Commerce Act affected carriers in their relations toward shippers and consumers, and also in their relations toward the communities, cities, and towns, through which the public

highways, operated by them under public franchises, extended. Remedies were required for other evils existing in connection with interstate commerce. Congress has undertaken, in a measure, to supply such remedies by appropriate legislation.

To afford relief to the employees of carriers engaged in interstate commerce, it has enacted the Employers' Liability Bill, authorizing an employee to recover damages for injuries he may have sustained, even though such injuries may have been occasioned by the negligence of a fellow servant or co-employee. The bill goes further and gives to the legal representatives of a deceased employee, in the service of a common carrier, a cause of action against the employer, for damages for injuries resulting in the death of the employee.

The employment of one engaged by a common carrier, to transport persons and property at the highest rate of speed, which the genius of man has made possible, is one of peculiar peril. More than a million of men are so employed. The dangers attending their employment will be understood when attention is called to the fact that in the year 1904, 10,046 of these employees were killed and 84,155 were maimed or injured on the public highways of the nation. Of the number of passengers carried in 1904, 441 were killed and 9,111 were injured. These *quasi*-public servants have complained justly, that the law furnished no adequate relief when they sought to recover damages. It is true the State courts were open, and the Federal courts also, when plaintiff and defendant were residents of different States. But established rules of evidence in some jurisdictions rendered a recovery in many cases doubtful, and in others impossible. At common law, a servant could not hold the master liable for the negligence of a fellow servant. This rule, while it has been abrogated in many States, still prevails in others. The law governing contributory negligence also is not uniform. In the Federal courts the question of contributory negligence is usually a question of fact for the jury; but in many States slight evidence of plaintiff's contributory negligence will constitute a bar to his recovery.

The Employers' Liability Bill, approved June 11, 1906, establishes a uniform rule. Under it the negligence of a fellow servant will not bar his action, and in every case the question of contributory negligence, where plaintiff's negligence was slight, becomes a question of fact for the jury, who may consider the comparative degree of plaintiff's negligence, and diminish the amount of damages "in proportion to the amount of negligence attributable to such employee."

Statutes making the carrier liable to an employee for the negligence of a fellow servant, have been adopted in many States. Those in Kansas, Iowa, and Indiana, have been sustained by the Supreme Court of the United States.* Their validity was put upon the ground of the extreme hazard attending the employment of operating a railway. "The business of other corporations," said Mr. Justice FIELD, in the Mackey case, "is not subject to similar dangers to their employees, and no objection, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities." As to creating a new liability against the employer, where no personal wrong is chargeable to the corporation, or its directors, Mr. Justice FIELD observed: "The same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility, therefore, at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence." The court held that the State legislature had power to extend like liability where an employee was injured through the negligence of a fellow servant.

* *Tullis v. Lake Erie & Western Railroad*, 175 U. S. 348; *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway v. Pontius*, 157 U. S. 209.

PURE FOOD LEGISLATION.

Legislation has been enacted also to provide remedies for other commercial evils, bordering very closely on the exercise of the police power, which remains in the States, and has never been delegated to the Federal government. The cupidity of great industrial corporations has increased with their unparalleled growth and prosperity. Not millions, but hundreds of millions have been invested in combinations which control the food supply of the country, and which furnish also the beverages, liquors, and medicines in common use. Congress, by the enactment of the Pure Food Bill and the Meat Inspection Bill, has said in effect to these public purveyors, the food, which you supply through agencies of interstate commerce, must be pure and wholesome, and every article of commerce intended for consumption, whether for meat or drink, must be what it purports to be, to entitle it to be carried from one State to another. To that extent Congress, by enacting this legislation, has sought to regulate such commerce, to protect the community from the greed which has prompted unscrupulous methods in the preparation and sale of the necessities of life. The statute requires these products to be labeled and branded, and forbids their interstate transportation unless so labeled. The label must designate the contents and nature of the article labeled, and the use of a false label is made a crime.

Laws respecting food products have heretofore been enacted by Congress, namely, taxing and regulating the preparation and sale of oleomargarine (Act of August 2, 1886); of filled cheese (Act of June 6, 1896), and mixed flour (Act of October 1, 1890). But the Pure Food Bill and the Meat Inspection Bill is the first general legislation seeking to regulate the preparation and sale of food products, beverages, and medicines.

HALL-MARK OR JEWELERS' LIABILITY BILL.

Congress has legislated also with regard to the manufacture and sale of merchandise prepared from gold and silver, and has enacted what is known as the Hall-mark

or Jewelers' Liability Bill. The hall-mark affixed by the goldsmith and silver smith, and the worker in the precious metals, must designate the true weight and fineness of the metal, and the use of a spurious hall-mark is made a criminal offense.

Hall-marks were devised during the Middle Ages to keep the standard of articles made from the precious metals to the required purity. They have been in use in England for more than six hundred years. The first law making their use compulsory was in the reign of Edward I, in the year 1300 (29 Edw. I, Stat. 3, Ch. 30). Under this statute the stamp was designated as the King's mark, represented by a leopard's head or a lion's head, crowned. In 1363 a law was passed (37 Edw. III, Ch. 7) allowing the manufacturer to add his own mark to that of the king, it being known as the maker's mark. A devise was also adopted in 1438 known as the assayer's mark, indicated by a year letter, consisting of an alphabet, one letter being used for each year, counting from the day of the annual election of the Goldsmith's Company. After the entire alphabet was exhausted, different shaped letters were used to continue and preserve the chronology. A spoon with the three marks complete, indicating the year mark for 1445, may be seen in the South Kensington Museum. The spoon was given by Henry VI to Sir Ralph Pudsey.

Congress has now made the use of the hall-mark compulsory, by forbidding the importation, exportation, or carriage in interstate commerce of falsely or spuriously stamped articles of merchandise made of gold or silver, or their alloys.

In this supplement, in addition to the text of the various statutes, will be found also full notes of all decisions reported since the publication of "Snyder's Interstate Commerce Act and Federal Anti-Trust Laws," in July, 1904.

WILLIAM L. SNYDER.

TEMPLE COURT, 5 Beekman street,
NEW YORK, *August*, 1906.

SUPPLEMENT
TO
SNYDER'S INTERSTATE COMMERCE ACT AND
FEDERAL ANTI-TRUST LAWS.

CHAPTER ONE.

Text of the Interstate Commerce Act, as Amended
June 29, 1906. In Effect August 28, 1906.

An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

Sec. 1. Commerce Act — Interstate Commerce Defined.*

—That the provisions of this Act shall apply to any *corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe*

*The side headings in bold face type are inserted for convenience, and form no part of the text of the Act.

For easy reference the *amended* sections and *new* sections of the Commerce Act and Elkins Act are printed with leads between the lines, the unamended sections are printed solid, without leads, changes introduced by amendment are indicated, where practical, by italic, or a reference at end of paragraph if it consists of entirely new matter.

lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Sec. 1. Commerce Act continued — Definitions — Common Carrier — Railroad Transportation.—*The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad," as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight*

depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

Sec. 1. Commerce Act Continued — Charges must be Reasonable.—All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith,^[1] shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 1. Commerce Act Continued — Free Transportation, when Prohibited.*—No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in

[1] Words "for the receiving, delivery, storage, or hauling such property" omitted.

*These provisions with regard to free passes and free transportation, introduced by the Act of June 29, 1906, are practically a re-enactment of Sec. 22 of the Commerce Act, and wherever they conflict with the provisions of Sec. 22 the provisions of the latter section are repealed. See Sec. 22, *post*, page 35.

charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (*New Provision added by Act of June 29, 1906.*)

Sec. 1. Commerce Act Continued — Carriers not to deal in Commodities Transported.—From and after May first,

nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. (*New Provision added by Act of June 29, 1906.*)

Sec. 1. Commerce Act Continued — Switches and Terminal Facilities.—Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the

enforcement of all other orders by the Commission, other than orders for the payment of money. (*New Provision added by Act of June 29, 1906.*)

Sec. 2. Commerce Act — Rebates Prohibited — Unjust Discrimination Defined.— That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. Commerce Act — Preferences and Advantages.— That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 3. Commerce Act Continued — Duty of Connecting Lines.— Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. Commerce Act — Long and Short Haul Regulations — Power of Commission.— That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggre-

gate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 5. Commerce Act — Pools and Combinations Prohibited.— That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. Commerce Act — Schedule of Rates to be Published.*— That every common carrier subject to the provisions of this Act shall *file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate has been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation.* The schedules printed as aforesaid by any such common carrier shall plainly state the places^[1] between which property and passengers will

*Section 6 has been entirely re-arranged by the Act approved June 29, 1906.

[1] Words "upon its railroad" omitted.

be carried, and shall contain the classification of freight in force, and shall also state separately *all* terminal charges, *storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed* and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, *or the value of the service rendered to the passenger, shipper, or consignee.* Such schedules shall be plainly printed in large type, and copies for the use of the public shall be *kept* posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.*

Sec. 6. Commerce Act Continued — Rates Through Foreign Country.—Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Sec. 6. Commerce Act Continued — Change of Rates must be on Notice.—No *change* shall be made in the rates, fares, and charges *or joint rates, fares, and charges* which have

been filed and published by any common carrier in compliance with the requirements of this section, except after *thirty days' notice to the Commission and to the public published as afore-said*, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the *changed** rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.*

Sec. 6. Commerce Act Continued — Provision as to Joint Tariff Rates.— *The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.*

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

*Word "changed" substituted for word "increased."

Sec. 6. Commerce Act Continued — Publication Condition Precedent — Preference Time of War.— *No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."*

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

That section one of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, 1903, be amended, so as to read as follows:

Sec. 1. Elkins Act — Liability for Acts of Agents Receivers, Trustees, etc. — Imprisonment.— That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation,

would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Act or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, *whether carrier or shipper*, who shall, *knowingly*, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine*

and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, *or shipper*, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier *or shipper* as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Sec. 1. Elkins Act Continued — Rebates — Forfeiture of three times Amount, as Additional Penalty.— Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as

fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.* (*New provision added by Act of June 29, 1906.*)

Sec. 7. Commerce Act — Continuous Carriage from Point of Shipment to Point of Destination.— That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

*For the remaining sections of the Elkins Act (Sections 2, 3, 4 and 5), see Snyder's Interstate Commerce Act, pages 135-138.

Sec. 8. Commerce Act—Liability of Carrier in Damages.—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. Commerce Act — Remedy of Shipper in Alternative by Complaint to Commission or Suit in Federal Court.—That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. Commerce Act — Criminal Liability of Carrier.—That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet

therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.* [Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.]

Sec. 10. Commerce Act Continued — Criminal Liability of Carrier for False Bills, Weights or Classification.— Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars,† [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.]

*The penalty of imprisonment which was abolished by Sec. 1 of the Elkins Act, approved February 19, 1903, was restored by the amendment of that section by the Act approved June 29, 1906. The imprisonment penalty as restored seems to relate only to the crime of rebating. See Elkins Act, Sec. 1, as amended under Sec. 6 of the Commerce Act, *ante*, page 11. For original Elkins Act, Sec. 1, see Snyder Interstate Commerce Act, page 134.

†The penalty of imprisonment was abolished by Sec. 1 of the Elkins Act, approved February 19, 1903, which declared that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being

Sec. 10. Commerce Act Continued — Criminal Liability of Shipper for False Bills, Weights or Classification.— Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court].

Sec. 10. Commerce Act Continued — Joint and Several Criminal Liability of Shipper and Carrier.— If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any

hereby abolished." See Elkins Act, Snyder's Interstate Commerce Act, page 134.

Section 1 of the Elkins Act was amended by the Act of June 29, 1906, and the portion of the section abolishing imprisonment was omitted, and a clause inserted therein making violations of the Elkins Act and certain parts of the Commerce, punishable by imprisonment, or by fine, or by both fine and imprisonment. The imprisonment penalty as restored, however, seems to relate only to the crime of rebating. See Elkins Act, Sec. 1, as amended under Sec. 6 of the Commerce Act, *ante*, page 11.

*The penalty of imprisonment was abolished by Sec. 1 of the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, Snyder's Interstate Commerce Act, page 134.

Section 1 of the Elkins Act was amended June 29, 1906, and the penalty of imprisonment was restored as therein provided, but seems to relate only to the crime of rebating. See Elkins Act, Sec. 1, as amended, *ante*, page 11.

other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars,* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court,] for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (*As amended March 2, 1889.*)

Sec. 11. Commerce Act — Interstate Commerce Commission Created.—That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners,† who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or hold-

* The penalty of imprisonment was abolished by the Elkins Act, Sec. 1, approved February 19, 1903, which declared that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, Snyder's Interstate Commerce Act, page 134.

Section 1 of the Elkins Act was amended by the Act of June 29, 1906, and the penalty of imprisonment was restored as therein provided, but seems to relate only to the crime of rebating. See Elkins Act, Sec. 1, as amended, *ante*, page 11.

† Increased to seven Commissioners, and terms of office extended to seven years, by Section 24 of the Act, being a new section added by Act of June 29, 1906. See Section 24, *infra*, page 37.

ing any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Sec. 12. Commerce Act — Commission may Prosecute through United States District Attorney.— That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Sec. 12. Commerce Act Continued — Witnesses — Attendance Compulsory.— Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Sec. 12. Commerce Act Continued — Penalty for Disobedience of Witness.— And any circuit courts of the

United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 12. Commerce Act Continued — Testimony Taken by Deposition.—The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Sec. 12. Commerce Act Continued — Deposition, how Taken.—Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Sec. 12. Commerce Act Continued — Foreign Witnesses — Fees.— If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States. (*As amended March 2, 1889, and February 10, 1891.*)

Sec. 13. Commerce Act — Complaint to Commission, How Made — Investigations, How Conducted.— That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Sec. 13. Commerce Act Continued — Complaints by State Railroad Commissions.— Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. Commerce Act — Reports and Finding of Commission shall be Evidence.— That whenever an investiga-

tion shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall *state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.*

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports. (*First Paragraph rearranged by Act of June 29, 1906.*)

Sec. 15. Commerce Act — Commission May Fix Rates.— That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and

reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. (*Rearranged and power to fix rates added by Act of June 29, 1906.*)

Sec. 15. Commerce Act Continued — When Order of Commission takes Effect — Supplemental Order, Joint Rates.—All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order. (*New provision added by Act of June 29, 1906.*)

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall

apply when one of the connecting carriers is a water line.
(*New Provision added by Act of June 29, 1906.*)

Sec. 15. Commerce Act Continued — Payment by Carrier for Services and Instrumentalities.— If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act. (*New Provision added by Act of June 29, 1906.*)

Sec. 16. Commerce Act — Order for Damages, how Enforced — Findings of Commission Prima Facie Evidence.— That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he

claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. (*Rearranged by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Damage Claims to be Filed within two Years.—All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year. (*New Provision added by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Damage Claims — Parties.—In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant

found to be liable to such plaintiff. (*Rearranged by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Order — How Served—Modification, or Suspension of.— Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. (*Rearranged by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Orders how Enforced — Penalties and Forfeitures.— Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropria-

tion for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation. (*New Provision added by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — When Orders Enforce by Injunction.— If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus. (*Rearranged by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Appeal, Venue — Provisions as to Court Review.— From any action upon such petition an appeal shall lie by either party to the Supreme

Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three,* shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided, That no injunction,*

* For text of the Expediting Act of February 11, 1903, see Synder's Interstate Commerce Act, page 219.

interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes. (*Rearranged by Act of June 29, 1906.*)

Sec. 16. Commerce Act Continued — Schedules filed Prima Facie Evidence.— The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals. (*Rearranged by Act of June 29, 1906.*)

Sec. 16a. Commerce Act — Application for Re-hearing.— That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may

establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order. (*New Section added by Act of June 29, 1906.*)

Sec. 17. Commerce Act — Procedure before Interstate Commerce Commission.—That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas. (*As amended March 2, 1889.*)

Sec. 18. Commerce Act — Salary of Commission — Fees and Expenses.—[That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United

States.]* The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the commission. (*Amended March 2, 1889.*)

Sec. 19. Commerce Act — Sessions of Commission, Where held.— That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Sec. 20. Commerce Act — Annual Reports — Contents — Uniformity.— That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, *and from the owners of all railroads engaged in interstate commerce as defined in this Act*, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any,

*The salary of the Commission, as provided in Sec. 18 of the Commerce Act was increased by the Act approved June 29, 1906, which added Sec. 24 to the Act, enlarging the Commission to seven members. See Sec. 24, *post*, page 37.

and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; *the accidents to passengers, employees, and other persons, and the causes thereof*; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts *affecting the same* as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.*

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto.

* The remainder of the provisions of section 20 are new and were added by Act of June 29, 1906.

The Commission shall also have authority to require said carriers to file monthly reports* of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided. (*New Provision added by Act of June 29, 1906.*)

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken. (*New. Added by Act of June 29, 1906.*)

Sec. 20. Commerce Act Continued — Uniform Books and Accounts of Carriers, When Compulsory.— The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. (*New Provision added by Act of June 29, 1906.*)

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda

*This provision which was added to Sec. 20, of the Commerce Act, should be read in connection with the Act of March 3, 1901, requiring common carriers to make monthly reports of accidents. For this Act see Snyder's Interstate Commerce Act, page 229.

as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both. (*New. Added by Act of June 29, 1906.*)

Sec. 20. Commerce Act Continued — Mandamus on Application of Commission or Attorney-General.— That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions

of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus* commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence. (*New. Added by Act Approved June 29, 1906.*)

Sec. 20. Commerce Act Continued — Bill of Lading Compulsory — Initial Carrier Liable for Damages.— That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. (*New. Added by Act Approved June 29, 1906.*)

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof. (*New. Added by Act Approved June 29, 1906.*)

* The writ of mandamus, prior to the amendment of June 29, 1906, was authorized to compel the filing of schedules under section 6. Under section 20 as amended the writ is authorized to compel obedience to any requirement of the Commerce Act, or of the Elkins Act, or acts supplementary thereto.

Sec. 21.—Commerce Act—Commission to Make Annual Reports to Congress.—That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission. (*As amended March 2, 1889.*)

Sec. 22. Commerce Act — Free or Reduced Rates — Excursions — Mileage — Commutation Rates — Remedies Cumulative.—*That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act. (*As amended March 2, 1889.*)

Provided, further, That nothing in this act shall prevent the issuance of joint interchangeable five-thousand mile tickets.

* This Section has been partly re-enacted by new provisions on the same subject embraced in Section 1 of the Commerce Act, and should be read in connection therewith. See Sec. 1, *ante*, page 3. Where the provisions are inconsistent, Section 1 governs.

with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets, as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso. (*Added by Laws 1895, chap. 61; approved February 8, 1895.*)

Sec. 23. Commerce Act — Remedy by Mandamus to Move Traffic or Furnish Cars.— That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs or mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of

peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement. (*New section added March 2, 1889, being section 10 of chap. 382; approved March 2, 1889.*)

Sec. 24. Commerce Act — Commission Enlarged — Salaries — Term of Office.— That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Nor more than four Commissioners shall be appointed from the same political party.

Sec. 9. Act of June 29, 1906 — Application of Existing Laws.— That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts

amendatory thereof shall apply to any and all proceedings and hearings under this Act.

Sec. 10. — Act of June 29, 1906 — Repealer.— That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Sec. 11. — Act of June 29, 1906 — Act to Take Effect.— That this Act shall take effect, and be in force from and after its passage.

Resolution June 29, 1906 — Act in effect sixty days after Passage.— Section 11 of the Act of June 29, 1906 amending the Commerce Act, provided that the Act should take effect and be in force from and after its passage. On the same day the following joint resolution was passed:

Resolved, etc., That the Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," shall take effect and be in force sixty days after its approval by the President of the United States.

CHAPTER TWO.

COMMENT AND AUTHORITIES.

DECISIONS SINCE JULY, 1904.

The authorities cited in this chapter include those reported to and including 201 U. S. Reports, and 143 Federal Reporter.

- I. Constitutional Limitations — Sumptuary Laws — Police Power.
- II. Constitutional Limitations — Immunity.
- III. Commerce Act — Elkins Act — Pooling Rebates — Discrimination.
- IV. Commerce Act — Carrier Cannot be Dealer.
- V. Imprisonment — Crimes and Conspiracies.
- VI. Commerce Act — Mandamus.
- VII. Commerce Act — Jurisdiction — Evidence — Remedies — Procedure.
- VIII. Criminal Trusts Under Sherman Act.
- IX. State Anti-Trust Laws Enumerated.
- X. Safety Appliance Law.
- XI. Telegraph Companies.

I. CONSTITUTIONAL LIMITATIONS — SUMPTUARY LAWS — POLICE POWER.

§ 1. Interstate Commerce — Original Package, What Constitutes.— The term “original package” is not defined by statute. Its size and shape cannot always be determined by judicial authority, so as to bring it within the protection of the commerce clause of the Constitution, exempting interstate commerce from State legislation. The term “original package,” however, does not include packages which cannot be commercially transported from one State to another. Where a person transporting goods selects an unusual method for the express purpose of evading or defying the police laws of another State, the commerce clause of the

States.]* The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the commission. (*Amended March 2, 1889.*)

Sec. 19. Commerce Act — Sessions of Commission, Where held.— That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Sec. 20. Commerce Act — Annual Reports — Contents — Uniformity.— That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, *and from the owners of all railroads engaged in interstate commerce as defined in this Act*, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any,

*The salary of the Commission, as provided in Sec. 18 of the Commerce Act was increased by the Act approved June 29, 1906, which added Sec. 24 to the Act, enlarging the Commission to seven members. See Sec. 24, *post*, page 37.

and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; *the accidents to passengers, employees, and other persons, and the causes thereof*; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts *affecting the same* as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.*

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto.

* The remainder of the provisions of section 20 are new and were added by Act of June 29, 1906.

The Commission shall also have authority to require said carriers to file monthly reports* of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided. (*New Provision added by Act of June 29, 1906.*)

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken. (*New. Added by Act of June 29, 1906.*)

Sec. 20. Commerce Act Continued — Uniform Books and Accounts of Carriers, When Compulsory.— The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. (*New Provision added by Act of June 29, 1906.*)

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda

*This provision which was added to Sec. 20, of the Commerce Act, should be read in connection with the Act of March 3, 1901, requiring common carriers to make monthly reports of accidents. For this Act see Snyder's Interstate Commerce Act, page 229.

as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both. (*New. Added by Act of June 29, 1906.*)

Sec. 20. Commerce Act Continued — Mandamus on Application of Commission or Attorney-General.—That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions

of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus* commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence. (*New. Added by Act Approved June 29, 1906.*)

Sec. 20. Commerce Act Continued — Bill of Lading Compulsory — Initial Carrier Liable for Damages.— That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. (*New. Added by Act Approved June 29, 1906.*)

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof. (*New. Added by Act Approved June 29, 1906.*)

* The writ of mandamus, prior to the amendment of June 29, 1906, was authorized to compel the filing of schedules under section 6. Under section 20 as amended the writ is authorized to compel obedience to any requirement of the Commerce Act, or of the Elkins Act, or acts supplementary thereto.

Sec. 21.—Commerce Act—Commission to Make Annual Reports to Congress.—That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission. (*As amended March 2, 1889.*)

Sec. 22. Commerce Act — Free or Reduced Rates — Excursions — Mileage — Commutation Rates — Remedies Cumulative.—*That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act. (*As amended March 2, 1889.*)

Provided, further, That nothing in this act shall prevent the issuance of joint interchangeable five-thousand mile tickets,

* This Section has been partly re-enacted by new provisions on the same subject embraced in Section 1 of the Commerce Act, and should be read in connection therewith. See Sec. 1, *ante*, page 3. Where the provisions are inconsistent, Section 1 governs.

with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets, as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso. (*Added by Laws 1895, chap. 61; approved February 8, 1895.*)

Sec. 23. Commerce Act — Remedy by Mandamus to Move Traffic or Furnish Cars.— That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs or mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of

peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement. (*New section added March 2, 1889, being section 10 of chap. 382; approved March 2, 1889.*)

Sec. 24. Commerce Act — Commission Enlarged — Salaries — Term of Office.— That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Nor more than four Commissioners shall be appointed from the same political party.

Sec. 9. Act of June 29, 1906 — Application of Existing Laws.— That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts

§ 9. Immunity Under State Statute — Constitutionality Sustained.—Authority to determine what crimes are punishable, and to provide for their punishment, is part of the police power of a sovereign State. This power was not conferred by the Constitution of the United States upon the Federal government, and remains in the State. The Fourteenth Amendment to the United States Constitution does not create, narrow, or widen the police power, but leaves it as it was before the amendment was adopted. No immunity in a State statute can be broad enough to include immunity from Federal prosecution, but the absence of such immunity does not necessarily invalidate the State law. (*Jack v. Kansas*, 199 U. S. 372.)

The decision in *Jack* case arose in a proceeding commenced under the Kansas Anti-Trust Law (Laws 1897, chap. 265). The plaintiff in error was subpoenaed to appear before the district judge of Shawnee county, Kansas, to be examined under the State Anti-Trust Law with regard to the existence of a monopoly or combinations of persons engaged in the operation of coal mines in Osage county, to fix the price of coal to be sold to residents and citizens of Kansas. Questions were put to the witness, who refused to answer upon the ground that the answers tended to incriminate the witness, and that as the immunity provisions of the Kansas statute were not broad enough to secure immunity from prosecution under the Federal Anti-Trust Laws, the witness was not bound to answer. The objections were overruled and the witness directed to answer, which he refused to do. The court then made an order committing the witness to the jail of Shawnee county for contempt until he should answer the questions; imprisonment not to exceed thirty days. The order was affirmed by the Supreme Court of Kansas, and upon a writ of error taken to the Supreme Court of the United States, the order was affirmed. The plaintiff in error contended that as the immunity granted by the State statute did not furnish immunity from prosecution under the Federal Anti-Trust Laws, the order directing him to answer, and ordering his imprisonment for failure to do so, deprived him of his liberty without due process of law within the meaning

of the Fourteenth Amendment. He claimed further that the Kansas statute was void on that ground. The Supreme Court held that the contention was without merit. The court observed that while it was true that the law of Congress was supreme, and that judges and courts in every State were bound thereby, and that a Federal statute granting immunity would properly operate in the State as well as in the Federal courts, and while there might be a bare possibility that a witness might be subjected to the criminal laws of some other sovereignty, yet it was not a real and probable danger, but so improbable that it need not be considered. The legal immunity secured by the Kansas statute operated in regard to a prosecution in the same jurisdiction, and was, therefore, sufficient. (*Jack v. Kansas*, 199 U. S. 372.)

§ 10. Immunity — Examination Before Grand Jury.—

The examination of a witness before a Federal grand jury is a "proceeding" within the act of February 25, 1903. The court held that the word "proceeding" is not technical, and is aptly used by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. The case in which this decision was rendered, known as "the Tobacco Trust case," arose in a proceeding instituted under a subpoena *duces tecum* commanding Hale, the plaintiff in error, to appear before the grand jury at a time and place named, to testify and give evidence in a certain action pending in the Circuit Court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company, and the MacAndrews & Forbes Company, on the part of the United States, and to bring and produce certain papers, books, and documents referred to in the subpoena. The witness declined to answer on three grounds: First, because it was physically impossible for the witness to get together the books and documents within the time specified in the subpoena; second, because he was under no legal obligation to produce anything called for by the subpoena, and third, because the answer might tend to incriminate him. The grand jury reported the matter to the court

and made a presentment that the witness was in contempt. The parties appeared before the circuit judge, who directed the witness to answer the questions and produce the papers. The witness persisted in his refusal, and the judge held him in contempt and committed him to the custody of the marshal, until he should answer the questions and produce the papers. The witness sued out a writ of *habeas corpus* which was dismissed and the prisoner remanded. An appeal was taken to the Supreme Court of the United States where the order of the court below was affirmed. It was urged on appeal, that the witness was subpoenaed before the grand jury, which was conducting an *ex parte* investigation, and although the language of the subpoena required the witness to testify and give evidence in a certain action now pending, that as a matter of fact no action was pending. It was contended, therefore, that there can be no prosecution in a criminal proceeding until after a formal indictment had been made showing that a criminal offense had been committed. That an investigation by a grand jury is not a "case" or "controversy" within the meaning of the Constitution, and that the investigation conducted by the grand jury was not a "proceeding, suit, or prosecution" under the act of February 25, 1903. That the act referred to was unconstitutional because it deprived the States of their right to prosecute persons concerned in transactions in violation of State laws. That the subpoena *duces tecum* was void under the Fourth Amendment, as an unlawful search and seizure of papers, and that the order deprived the witness of his liberty without due process of law. These objections were held untenable, and the dismissal of the writ of *habeas corpus* was affirmed. (*Hale v. Henkel*, 201 U. S. 43.)

§ 11. Immunity — Testimony Before Grand Jury.— Originally the grand jury seems to have been devised as a convenient method to assist itinerant justices in England to detect and punish crime, and a specific charge against a particular person is not necessary to give the grand jury jurisdiction. It acts on the information of the district at-

torney, or upon its own knowledge or information otherwise obtained. The scope of the powers of a grand jury is limited by the jurisdiction of the court of which it is an appendage. Under the ancient system in England, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of public peace. The usual practice was to prepare the proposed indictment, and lay it before the grand jury for their consideration, because that body was supposed to stand between the prosecutor and the accused, and to determine whether the charge was founded upon creditable testimony or was dictated by malice. There is no authority, however, for the proposition that a grand jury cannot proceed without the formality of a written charge. Their oath requires them to make diligent inquiry as to things given into their charge, and also all other matters and things which shall come to their knowledge. If the grand jury, of their own knowledge, or of the knowledge of witnesses examined before them, know of the commission of an offense for which no indictment is preferred, they must inform the public prosecutor and request an indictment, or give information to the court respecting the offense. This latter proceeding is called a presentment. In this country, the examination of witnesses before a grand jury need not be preceded by a presentment or indictment. Inquiry instituted by a grand jury is a proper and legal proceeding, therefore, whether an indictment has been framed or not, within the meaning of the act of February 25, 1903, and the witness before it was properly directed to answer the inquiry put to him. (*Hale v. Henkel*, 201 U. S. 43; *McAlister v. Henkel*, 201 U. S. 90.)

The fact that the statute was inoperative in that it did not extend immunity to the corporation of which the witness was the agent or representative was wholly untenable for the reason that the immunity extended by the Fifth Amendment was personal to the witness. It is a privilege which the witness alone can invoke, and it is wholly immaterial that some third person might be incriminated as

the result of the testimony given by the witness even although the witness might be the agent of such third person. In other words, a witness to whom immunity is extended by the statute will be compelled to testify and cannot plead that some other person, even the principal for whom the witness acts, might be subject to criminal prosecution. The amendment is limited to a person who shall be compelled to be a witness against *himself*. If, therefore, the witness cannot set up the privilege of a third person, he cannot set up the privilege of a corporation of which he may be an officer. (*Hale v. Henkel*, 201 U. S. 43; *McAlister v. Henkel*, 201 U. S. 90.)

§ 12. Immunity Does Not Extend to Corporation.—

The question whether a corporation is a "person" within the meaning of the Fifth Amendment to the Constitution which excuses a person in any criminal case from being a witness against himself is material only in a case where a corporation is called upon to answer a bill of discovery. The inquiry is not pertinent, when the privilege is claimed by a witness who is an officer or agent of the corporation. The corporation itself can only be heard by oral evidence in the person of some one of its agents or employees. A body corporate is an artificial inanimate entity. The corporation, as such, cannot be called as a witness. In this connection the court observed: "As the combination or conspiracies provided against by the Sherman Anti-Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the Legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information on the subject? Indeed, so strict is the rule that the privilege is a personal one, that it has been held in some cases that counsel will not be allowed to make the objection." (*Hale v. Henkel*, 201 U. S. 43; *McAlister v. Henkel*, 201 U. S. 90.)

§ 13. Immunity from Search and Seizure Extends to Corporation.—A corporation cannot be examined as a witness. It cannot, therefore, claim immunity under the Fifth Amendment of the Constitution for the reason that it cannot testify against itself. Nevertheless, a corporation is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures. Its property cannot be taken without compensation; it can only be proceeded against by due process of law, and is protected under the Fourteenth Amendment against unlawful discriminations. (*Gulf, etc., R. R. Co. v. Ellis*, 165 U. S. 150.) Corporations are an important feature of modern business activity, and their aggregate capital has become the source of nearly all great enterprises. An order for the production of books and papers may, therefore, constitute a reasonable or unreasonable search and seizure within provisions of the Fourth Amendment. But a corporation has no right to refuse to submit its books and papers for an examination at the suit of the State. An individual stands upon a different plane, in this regard, than a corporation. "The power of the individual to contract," says Justice Brown, "is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation so far as it may tend to incriminate him. He owes no such duty to the State, since he received nothing therefrom beyond the protection of his life and property. He owes nothing to the public so long as he does not trespass upon their rights.

"The corporation, however, is a creature of the State. It is presumed to be incorporated for the benefit of the public. It received certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it, so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and to find out whether it has exceeded its powers. It should be a strange anomaly to hold that a State,

having chartered a corporation to make use of said franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed and whether they had been abused, and demand production of the corporate books and papers for that purpose. The fact that the corporation receives its franchise from a sovereign State is not material, because such franchise, when exercised in connection with interstate commerce, must be exercised in subordination to the power of Congress to regulate such commerce. The corporation is subject to a dual sovereignty, and the Federal government possesses the same right to see that Federal laws are respected, as the State has with respect to the special franchise which it has conferred. The powers of the general government in vindicating its own laws, are the same as if the corporation had been incorporated by an act of Congress.

"It follows, therefore, that the examination of the books and papers of a corporation, if duly authorized by act of Congress, would not constitute an unreasonable search and seizure within the Fourth Amendment. The objection, however, of a witness to the validity of a subpoena *duces tecum* as being too broad as far as the corporation is concerned does not excuse the witness from answering questions put to him, and has no bearing upon the validity of an order committing him for contempt for refusal to do so." (*Hale v. Henkel*, 201 U. S. 43; *McAlister v. Henkel*, 201 U. S. 90.)

III. COMMERCE ACT — ELKINS' ACT — POOLING — RATES — DISCRIMINATION.

§ 14. Unreasonable Rates — Charges Based on Shippers' Profits.—Where industries have been established to manufacture, sell, and ship certain commodities, to-wit, lumber, and the success attending the enterprise has greatly increased the profits resulting from the business, a carrier transporting the property has no legal right to increase the costs of carriage of the lumber in proportion to the prosperity and increased profits resulting from the suc-

cess of the enterprise. The carrier cannot arbitrarily draw to itself a portion of the profits of the manufacturer and producer whose commodities it transports, by arbitrarily increasing the charges of transportation in proportion to the profits earned by the enterprise of the shipper. Such arbitrary increase is unlawful, and will be restrained by injunction. (*Tift et al. v. Southern R. R. Co.*, 138 Fed. Rep. 753. June, 1905, Cir. Ct., W. D. Georgia, S. D.)

§ 15. Pooling — What Constitutes.—A number of railroads combined and formed what is known as the Southeastern Freight Association. By concert of agreement, rates were advanced upon shipments of a particular class throughout the territory influenced by the association. Such a combination, when it actually advances rates and exacts the same of the shippers, will not be excused, nor will participants be relieved from the consequences of its acts, upon the ground that the members of the association have signed a stipulation, that each and all members can, at will, and at any time, withdraw from the agreement. The combination, when its object is to unreasonably advance rates, violates the provisions of the Interstate Commerce Act, which forbids pooling. The prohibition as to pooling was intended to destroy monopolies and secure competition. "Pooling," says SPEER, J., "may be as well effected by a concert in fixing in advance the rates, which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all such earnings to a common account and distributing them afterward. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the State courts." (*Tift et al. v. Southern R. R. Co.*, 138 Fed. Rep. 753. June, 1905, Cir. Ct., W. D. Georgia, S. D.)

§ 16. Pooling — When Joint Through Rate Is Not.—A joint through rate, made by carriers having terminals on

the Pacific coast to transport oranges, lemons, and other citrus fruits to the Atlantic seaboard, the through rate being guaranteed by the initial carrier, on condition that the carrier and not the shipper shall select the routes to the Atlantic coast over the roads connecting with the eastern terminals of the initial carrier, is not a violation of section 5 of the Interstate Commerce Act, prohibiting pooling. (*Southern Pacific Co. v. Interstate Com. Co.*, 200 U. S. 536; *Southern California Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536; *Atchison, Topeka & Santa Fé Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536; *Santa Fé Pacific Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536.)

The case cited arose upon an application by the Interstate Commerce Commission to the United States Circuit Court, southern district of California, to enforce an order of the commission, directing the carriers to cease and desist from enforcing their rule denying shippers of citrus fruits to designate the routes beyond the terminals of the initial carriers, for transportation of their property from California to the eastern markets, on the ground that the rule was in violation of various provisions of the Interstate Commerce Act. The court below enjoined the enforcement of the rule and the carriers appealed. The judgment appealed from was reversed and the injunction dissolved.

Prior to the adoption of the rule, shippers were accustomed to select the eastern route from the terminals of the initial shippers to the seaboard, over which the fruit was shipped, and in the enjoyment of this right the shippers, it was charged, received rebates from the eastern carriers operating roads beyond the terminals of the initial carriers. One shipper, the Southern California Fruit Exchange, admitted that in four years it received rebates amounting to \$174,000. Among those participating in these rebates were the car-line companies, owning cars in which the fruit was packed, described as ventilating or refrigerating cars, which cars were hired by the initial carriers. The car companies received a bonus from eastern connecting roads, of from \$10 to \$40 a car, in consideration of the car being routed over the line, paying the bonus, a part of which was usually turned over

to the shipper by the car company for the privilege allowed the latter of routing the shipment. The right of routing, therefore, was extremely valuable to the shipper and to the private carline companies. In order to break up the practice of rebating, which proved so valuable to the shipper, the initial carriers established the following rules:

Rule as to Routing.—“In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carriers giving the guarantee. In accordance with this rule, agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions.”

“Initial carriers will route each car from point of origin to point of destination and diversion in transit will not be permitted, except by consent of initial carrier, who will thereupon designate new routing when diversion necessitates change therein.”

The initial carriers on the Pacific coast embraced two systems known as the Southern Pacific and Santa Fé, whose termini were at Chicago, Ogden, and New Orleans, from which points the eastern shippers over various routes transported the fruit to all parts of the United States. After the rules denying to the shipper the right to select his routing, neither the shipper nor the car lines could secure rebates from the eastern carriers, because they could no longer designate the route over which the fruit should be shipped. The initial carrier then made joint-tariff rates for transportation of oranges, and citrus fruits from southern California at \$1.25 per hundred to practically all points east of the Missouri river, which tariff agreements were filed with the Interstate Commerce Commission. The initial carrier, however, did not assume liability for negligence of any connecting line. After a full hearing, the commission held that the agreement made by the initial carrier with their eastern connections constituted pooling of the rates on citrus fruit traffic, or the divided earnings therefrom, in violation of section 5 of the Interstate Commerce Act prohibiting pooling, and that the rule complained of subjected the shipper to undue, unjust, and unreasonable preference and disadvantage, and gave the carrier an undue and un-

reasonable preference and advantage in violation of section 5 of the Interstate Commerce Act.

The Supreme Court reversed the ruling of the Circuit Court, which sustained the order of the Commission, and dissolved the injunction upon the ground that under the circumstances of the case, and in view of the fact that citrus fruits were a particular kind of freight in regard to which all other freight has substantially nothing in common, and also in view of the fact that as all shippers were treated alike by the initial carrier, it could not be said that any unjust discrimination or preference resulted from the rule under the circumstances; therefore the court held that the agreements for joint through rates by the connecting carriers were not pooling agreements within the prohibition of section 5 of the Interstate Commerce Act. The court observed that the evidence showed that the rules were adopted by the initial carrier for the purpose of breaking up rebating, which had been accomplished, and the evidence showed that the eastern roads entered into the routing agreement because they were satisfied that it would be better than the practice of rebating, which had previously obtained, and that they would get a fair share of the business or, in other words, would be fairly treated by the initial carrier, who gave them to understand that they would be so treated and that there was no evidence of the existence of a tonnage pool. The court further said that the court below treated the connecting carriers as rival and competing transportation lines, and assumed that between these lines there would exist, but for the routing agreement, a competition for the fruit transportation, which competition was destroyed by the rule. The Supreme Court, in answer to this contention, said: "We think these various routes were really not competing roads within the meaning of the fifth section of the Commerce Act, when the facts are carefully examined. * * * The initial carrier did not on its line reach the eastern markets, but reached various connecting roads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates, with all or any of these connecting companies, though such companies

were competing ones among themselves." (*Southern Pacific v. Interstate Com. Co.*, 200 U. S. 536.)

§ 17. Discrimination — When Denial of Right of Shipper to Designate Route Is Not.— Where the initial carrier gives a guaranteed through rate on citrus fruits from California to the Atlantic seaboard, it may make a rule reserving the right to route the goods beyond their own terminals, and such routing by the initial carrier which gives such carrier the right to select over what lines it would transport the goods beyond its own line, would not constitute an unjust discrimination against the shipper, nor a pooling as prohibited by section 5 of the Interstate Commerce Act. The Supreme Court reversed *Interstate Com. Co. v. Southern Pacific Ry. Co.*, 123 Fed. Rep. 597, and dissolved the injunction granted by the Circuit Court, restraining the initial carriers from designating the routes beyond the lines of such carriers on the ground that the Commerce Act had not been violated by the carrier. (*Southern Pacific Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536; *Southern California Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536; *Atchison, Topeka & Santa Fé Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536; *Santa Fé Pacific Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536.)

Joint through rates are the subject of agreement between the companies under their control, and there is nothing in the Interstate Commerce Act to prevent an initial carrier guaranteed a through rate, and to reserve in its public notice thereof the right to route the goods beyond its own terminal. A carrier cannot be compelled to make a through rate if it does not see fit to do so beyond its own line. If, however, the carrier and other connecting lines of road make an agreement whereby an initial carrier may make a joint through rate over its own line and over other connecting lines, the initial carrier may select the connecting lines over which it will transport the goods and may reserve this right when it guarantees a through rate. It cannot be said that such a transaction is an unlawful designation within the meaning of the Interstate Commerce Act, if the business

and the character of the freight is of a special nature like the fruit business, having nothing in common with other freight.

The court observed that before the rule was promulgated by the initial carrier forbidding the shipper to designate the route beyond that of the initial carrier, it had been customary for the shipper to select his own route, and to collect rebates for the routing from the connecting carriers. The carriers claimed that they were obliged to adopt the rule so as to prevent the shipper from collecting unlawful rebates. In the trial of the case, the court said that there was nothing in the testimony taken before the Interstate Commerce Commission to show that the practice of collecting rebates to be paid to the shipper had been resumed after the rule had been adopted forbidding him to select his route, and this for the obvious reason that the shipper could not control the route, and hence it would be useless for the eastern railway companies to pay the shipper or the car-line companies rebates on freight which said eastern company was not receiving, and which the initial carrier alone had the routing of. As soon as the routing was agreed upon and the through tariff rates fixed, the eastern connections had to do business with the initial carrier, instead of the car company owning the cars in which the fruit was packed or the shipper. The shippers prepay or guarantee freight charges to destination. The initial carrier does not assume liability for damage resulting from negligence of any connecting line. The Circuit Court based its ruling upon the theory that the connecting carriers were rival and competing transportation lines and assumed that between these lines there did exist, but for the routing agreement, a competition for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates, and that as competition was destroyed by the rule, it was idle to say that such result was not maintained by the defendant, and the court concluded that the carrying out of the routing agreement was a violation of the Commerce Act. The Supreme Court, however, concluded that the various eastern roads were not, as matter of law,

to be regarded as competing roads within the meaning of section 5 of the Commerce Act, because the carriers had a right under the act to agree upon and provide for the publication of joint through tariff rates between continuous roads, provided such through rates were reasonable and no discrimination was practiced. That the initial carrier had the right to enter into an agreement for joint through rates with all or any one of the connecting companies, though such companies were competing among themselves, and such agreement could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provision of the Commerce Act. (*Southern Pacific Ry. Co. v. Interstate Com. Co.*, 200 U. S. 536.)

For fuller report of this case see "pooling," *ante*, page 55.

§ 18. Rebates — Discrimination — Freight Classification.

—One method resorted to by the carrier to hide rebates, and to discriminate against certain kinds of freight, is in the manipulation of freight classification. Rates and charges may be raised, and certain kinds of commodities discriminated against, by taking certain goods from the classification which entitle them to be carried for a certain amount, and placing them in another classification which will require the shipper to pay a higher rate of freight. An instance of this kind will be found in what is known as the *Hay case* (134 Fed. Rep. 142). Hay and straw in carloads were classed by the carrier in what was known as sixth-class freight. Commodities in this class are carried cheaper than commodities rated in the fifth class. In order to raise the freight on hay and straw, the carrier, on the 1st of January, 1900, took hay and straw out of sixth-class freight and classified it as fifth class, thus compelling the shipper to pay the higher rate.

Upon complaint of the shipper, testimony was taken before the Interstate Commerce Commission, which resulted in an order made by the commission, directing the carriers to cease and desist from charging fifth-class rates on hay and straw,

based upon findings that such rates were unreasonable. The commission also found that the whole advance was unreasonable, and that the advance and consequent placing of hay and straw in the fifth class unjustly discriminated against that commodity in favor of other articles furnishing less total tonnage to the carriers. The order of the commission further directed the carrier to cease and desist from failing or neglecting to apply sixth-class rates to shipments of hay and straw. The carrier failed to comply with the order, and the commission brought suit in the Circuit Court of the United States, northern district of Ohio, to secure the enforcement of its order. The court dismissed the petition upon the ground that the direction of the commission as to how freights should be classified was, in effect, exercising the power to fix rates, and that since the Commerce Act did not give the commission such power, its order was unlawful. (*Interstate Com. Co. v. Lake Shore & Michigan R. R. Co.*, 134 Fed. Rep. 140.)

On and after August 28, 1906, the objection that the Interstate Commerce Commission has no power to fix rates will have no application, as section 15 of the act as amended expressly confers such power.

§ 19. Discrimination — Transportation of Troops.— A difference in rates does not necessarily constitute an unjust discrimination. The government, in the transportation of troops in squads of ten or more, does not financially, or in any other way, come into competition with the reduced ten-party rate given to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, or tennis clubs, football teams, and other parties of like character, which is authorized by section 22 of the Commerce Act, providing for excursion rates, commutation rates, and the like. The government claimed the benefit of the "ten-party-rate schedule" in transporting its troops in squads of ten or more. *Held*, that the government was not entitled to claim the reduced rate. (*United States v. Chicago & Northwestern R. R. Co.*, 127 Fed. Rep. 785.)

See also, same ruling as to railroad running partly over tracks of railroad which received land grants from government under act of July 2, 1864. (*United States v. Astoria & Columbia River R. R. Co.*, 131 Fed. Rep. 1006.)

IV. COMMERCE ACT — CARRIER CANNOT BE A DEALER.

§ 20. Carriers Cannot Deal in Commodities which They Transport.— The Supreme Court of the United States in a decision rendered on the 19th of February, 1905, in what is known as the Chesapeake & Ohio Case, announced the doctrine that dealing in coal by a railway company was illegal, because incompatible with its duties as a public carrier, and calculated to inflict an injury upon the public. That any contract or arrangement entered into by a common carrier or permitting such carrier to engage in business as a dealer in the commodities which it transported was contrary to public policy and void. The court observed that "if a carrier may become a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier, in its capacity as dealer. No other person owning the commodity, being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier." (*New Haven R. R. Co. v. Interstate Com. Co.*, 200 U. S. 361; *Interstate Com. Co. v. Chesapeake & Ohio R. R. Co.*, 200 U. S. 361.)

The court, in support of the proposition, that to allow a carrier to deal in property which it transported was contrary to public policy, cited an authority by Vice-Chancellor Kindersley (*Attorney-General v. Great Northern Ry. Co.*, 29 Law Jour. N. S. Equity, 794), in which the English chancellor held that dealing in coal by a railway company was illegal, because incompatible with the duties of the railway as a public carrier and calculated to inflict an

injury upon the public. The vice-chancellor held that the act of Parliament granting the charter to operate the railway, implied a prohibition against the companies engaging in any other business. The reason for the rule was thus expressed by the vice-chancellor: "These large companies, joint-stock companies generally, for whatever purpose established and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways. * * * They might get into their hands the traffic, that is, the dealing in all the coal in the large districts supplying coal to the country. If they can do that with regard to coal, what is to prevent their doing it with every species of agricultural product all along the line? Why should they not become purchasers of corn, of all kinds of beasts and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which, or to which, the railway runs? I do not know where it is to stop if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal."

The court, by Mr. Justice WHITE, commenting upon the remedial character of the Interstate Commerce Act, and in support of the proposition that a carrier could not assume the duties of a dealer, remarked: "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent, and for these purposes, the statute was remedial, and

is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now, if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power,

to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly." (*New Haven R. R. Co. v. Interstate Com. Co.*, 200 U. S. 361; *Interstate Com. Co. v. Chesapeake & Ohio R. R. Co.*, 200 U. S. 361.)

The cases cited arose in a suit instituted in the United States Circuit Court of the district of West Virginia, by the Interstate Commerce Commission, to enjoin the carrying out of a contract under which the Chesapeake & Ohio Railway Company, a Virginia corporation, agreed to deliver at New Haven 60,000 tons of New River coal for the New York, New Haven & Hartford Railroad Company, a Connecticut corporation, at \$2.75 per ton. The price of coal at the mines, plus the cost of transportation from Newport News to New Haven, was \$2.47 per ton, while the published rate from the mine to Newport News was \$1.45 per ton, and the bill was based on the claim that this was in effect a discrimination, in that the company carried the coal for less than the published rates. In 1895 the State of West Virginia passed an act entitled "an act to prevent railroad companies from buying or selling coal or coke, and to prevent discrimination." To evade this statute, the place of delivery under the contract was to be at New Haven, Conn.

The company denied this, and alleged that it had sustained a loss on the price of the coal, and that it took this means to reimburse the New Haven road for some \$100,000 which it had lost through the inability to fill a previous contract owing to a strike of miners.

The Circuit Court held that there was no violation of the rebate provision of the Interstate Commerce Act, but held that the contract between the two roads was illegal, contrary to public policy, and void, and enjoined its enforcement. The two roads and the commission appealed.

The Supreme Court discussed the contract in question and also a previous contract, which was for 2,000,000 tons, with deliveries guaranteed by J. Pierpont Morgan. The various phases of both contracts are considered at length,

and the conclusion reached that they were void as against public policy, and also in violation of the Interstate Commerce Act, because the margin for freight rates was lower than the published rates.

The court modified the injunction granted by the Circuit Court by enlarging its provisions. In this regard Mr. Justice WHITE said: "As the court below did not decide that the second and third sections of the act relating to the maintenance of rates had been violated, the injunction issued by it was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake and Ohio from taking less than the rates fixed in its public tariff or freight rates by means of dealing in the purchase and sale of coal." As thus modified the decree below was affirmed. (*New Haven R. R. Co. v. Interstate Com. Co.*, 200 U. S. 361; *Interstate Com. Co. v. Chesapeake & Ohio R. R. Co.*, 200 U. S. 361.)

In declaring that the contract of the carrier, made by it as a dealer was contrary to public policy and void, the court said: "It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

"It is said, that as in the case in hand, it is shown that there was no intention on the part of the carrier in making

the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows, an arrangement was made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate; therefore, an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control.

"The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake and Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. While it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake and Ohio was wholly indifferent to and did not concern itself with the prohibition of the statute, of which, of course, it must be assumed to have had full knowledge." (*New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Interstate Commerce Commission v. Chesapeake & Ohio R. Co.*, 200 U. S. 361.)

§ 21. Carrier Cannot be a Dealer — Legislation of 1906 as to.— The wholesome doctrine that it is contrary to public policy to permit a carrier to deal in the commodities which it transports; that it cannot occupy the dual capacity of dealer or shipper, and carrier, was declared by the Supreme Court of the United States in February, 1906, in what is known as the Chesapeake and Ohio case, *supra*. The notable opinion of the court, written by Mr. Justice WHITE and concurred in by all of his associates, is a forcible and convincing argument showing the wisdom of the rule. On June 29, 1906, Congress enacted this rule of public policy into a law, and it now forms part of section 1 of the Commerce Act. "From and after May first, 1908," the statute declares, it shall be unlawful for any railroad company to transport among the

States and Territories, or to any foreign country "any article or commodity, other than timber or the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The value of this statutory prohibition is apparent, when we consider that it would be impossible for a carrier to discharge its duty, as such, to all shippers, affording to each equality of opportunity, and placing all upon an equal plane, when the carrier also becomes a shipper. It is obvious that a carrier, which is also a shipper, becomes a rival and competitor of every shipper to whom it owes a public duty to carry. As a carrier, it cannot serve itself, and also mete out impartial and exact justice to other shippers, and faithfully discharge its obligations in that regard.

V. IMPRISONMENT — CRIMES AND CONSPIRACIES.

§ 22. Imprisonment — Conspiracy Against the United States.— Under section 10 of the Commerce Act, as originally passed, the sentence imposed for its violation, included "imprisonment in the penitentiary for a term not exceeding two years" or a fine not exceeding \$5,000, or both, in the discretion of the court. On the 19th of February, 1903, the Elkins Act was passed, which contained a provision abolishing the penalty of imprisonment contained in section 10 of the Commerce Act, and substituted a fine, not less than \$1,000 nor more than \$20,000. The result of this legislation, as shown by the evidence secured by the Bureau of Corporations in the Department of Commerce and Labor, and by the Commissioner of Corporations under the act approved February 14, 1903, as reported from time to time to the Department of Justice, showed that the evils resulting from rebating and preferences and discriminations against shippers and localities, which it was sought to remedy by the Commerce Act and the Elkins Act, continued to be practiced with impunity. The punishment imposed,

being measured only by a fine, seems to have had no deterrent effect.

In view of these facts, the Attorney-General of the United States came to the conclusion that the only way to enforce violations of the Commerce Act and the Elkins Act was to secure indictments, under which the defendants, upon conviction, could be sent to prison. Resort was had to section 5440 of the United States Revised Statutes, which makes it a crime for two or more persons to conspire to commit any offense against the United States. Conviction under this section for conspiracy, prior to the amendment of 1897, authorized the court to impose a penalty by fine, and also imprisonment, for not more than two years. In construing this section, the Supreme Court of the United States in *Clune v. United States*, 159 U. S. 590, declared that if the crime which defendants conspired to commit was punishable only by fine, nevertheless, if the defendants were convicted under the conspiracy clause of the Revised Statutes, they were subject to the penalties imposed by that section, which included imprisonment for not more than two years.

It was contended, by counsel for accused, in the *Clune* case, that a conspiracy to commit an offense could not be punished more severely than the offense itself, and that, therefore, when the principal offense is in fact committed, the mere conspiracy is merged in it.

In answer to this contention, the court, BREWER, justice said: "The language of the section is plain, and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor is fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, is a matter to be considered solely by the legislative body." The court cited in support of its opinion also *Callan v. Wilson*, 127 U. S. 540.

After this decision, the conspiracy section was amended in 1897, by making the punishment of imprisonment in the alternative, and fixing a maximum fine of not more than

\$10,000, with no minimum specified, and giving the court discretion to impose either or both penalties.

In view of these plain provisions of the conspiracy section the Attorney-General gave instructions to district attorneys throughout the country to investigate all complaints for violations of the Elkins Act and Commerce Act, and if reasonable grounds therefor existed and sufficient evidence could be obtained, to submit such evidence to the grand jury under section 5440 of the United States Revised Statutes, charging conspiracy to commit a crime against the United States. The section of the Revised Statutes, as amended 1879, provides as follows:

Conspiracy Against the United States.—If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court. (*U. S. Rev. Stat.*, § 5440.)

Indictments were found, under this section, in Kansas City, eastern district of Missouri, against Thomas and Taggart, for conspiring to commit the crime of rebating, which is an offense against the United States, forbidden by the Commerce Act and the Elkins Act, but made punishable, under those acts, only by fine.

Similar indictments were found also by the grand jury in the county of New York, southern district of New York, against certain shippers and officers of the New York Central railroad. The indictments in Kansas City were tried in June, 1906, before Hon. SMITH McPHERSON, and were sustained and the defendants were convicted. Judge McPherson followed *Clune v. United States*, 159 U. S. 590, above cited, and held that a conspiracy to commit an offense was a distinct crime from that sought to be committed. Congress having made it a separate offense, with a different penalty.

The New York indictments, under the conspiracy clause of the United States Revised Statutes, were demurred to by

defendants. The demurrers were argued June 29, 1906, before Hon. GEORGE C. HOLT, district judge, shortly after the Kansas City indictments were sustained by Judge McPHERSON. Judge HOLT, after careful consideration, felt constrained to differ from the ruling made by Judge McPHERSON, sustained the demurrers and dismissed the indictments. "To claim that the agreement to give a rebate is a conspiracy punishable by imprisonment," said Judge HOLT, "while the actual giving of it is an offense punishable only by fine seems to me too subtle a distinction to be drawn in the administration of the criminal law."

It would seem that the practical effect of Judge HOLT's opinion, if sustained, would operate to nullify section 5440 of the United States Revised Statutes, because if an act is made a crime, the accused must be indicted and tried for committing it. If he conspires with another to commit it he cannot be indicted for the conspiracy, but the District Attorney must confine his indictment to the direct commission of the offense.

In this connection, it may be observed, that the imprisonment penalty, for violations of the Commerce Act and the Elkins Act, was not restored by the Act of June 29, 1906, except only as to the crime of rebating. In one sense, any violation of these laws, whether it be by means of false bills, false weights, false classification, failure to furnish cars, or move traffic, might be held to be a mere cover or device to accomplish the crime of rebating, which in its essence is the act of the carrier in charging one shipper more than another for the same service, or for substantially the same service. But in the administration of the criminal law, it is extremely doubtful if the crime of false billing, false weights, or false classification, or discrimination in car service or in the use of terminal facilities can be punished by imprisonment. All these offenses were made punishable by imprisonment under section 10 of the Commerce Act, prior to the passage of the Elkins Act, February 19, 1906. Failure to obey a writ of mandamus to furnish cars or move traffic was made, under section 6 of the Commerce Act, punishable "as and for a contempt," which is punishable by fine and imprisonment.

These punishments were not directly restored by the Act of June 29, 1906.

§ 23. Criminal Liability — Rebates — Concessions — Foreign Shipments.—The Elkins Act of February 19, 1903, declares that it shall be unlawful for the carrier to receive or collect from any person a greater or less compensation than it charges or collects from any other person for a like service and makes it a criminal offense for the carrier or any person or corporation "to offer, grant, or give or to solicit, accept, or receive any rebate." Criminal proceedings were instituted on behalf of the Government against Armour & Co., Swift & Co., The Cudahy Company, The Nelson Morris Packing Company, and others for a violation of the provisions of the Elkins Act relating to rebates. It was charged that the defendants accepted a rate of twenty-three cents per 100 pounds on shipments of lard consigned to Germany by way of the Burlington railway, when the legal tariff was thirty-five cents per 100. The case was tried in June, 1906, in the United States District Court at Kansas City, Mo., before Hon. SMITH MCPHERSON. The jury found the defendants guilty. The contention of the defendants was that the twenty-three-cent rate was legal because the Burlington railroad raised its tariff to thirty-five cents per 100 after it had made its contracts with the defendants. After the contract had been made with defendants at the twenty-three-cent rate, which expired on the 31st day of December, 1905, the railroad company, prior to the expiration of the contract, on the 6th day of August, 1905, filed a new schedule of tariffs fixing the rate of thirty-five cents per 100 pounds. The court held that defendants knowingly, after the rate had been changed, continued to pay, and the railroad company continued to accept, the twenty-three-cent rate, while other shippers were obliged to pay thirty-five cents for the same service. The court held that this was a violation of the Elkins Act. The court charged the jury as follows:

"According to the indictment returned against the defendant, the packing company signed a contract to run until December 31,

1905, in which the Burlington railway agreed, with other connecting railways, to carry packing-house products from the Missouri river to Germany, billed *via* New York; that the rate agreed upon included a rate of twenty-three cents a hundred pounds between the Mississippi river and New York; that while this contract was in existence the Burlington railway filed with the Interstate Commerce Commission an amended tariff of thirty-five cents on these products from the Mississippi river to New York; and that the defendant continued to accept the twenty-three-cent rate after August 6, 1905, when the alleged offense was committed.

"The Constitution of the United States gives Congress the power to regulate commerce between the States and with foreign nations. And in the exercise of this power Congress did enact the two statutes of February 4, 1887, and of February 19, 1903, the last being amendatory of the former.

"And the court charges you that in carrying the products from Kansas City, Kan., in and through this division and district to the Atlantic seaboard ports, to be loaded there on vessels and carried to European ports, such commerce was with foreign nations and was such commerce as is referred to and covered by the two enactments of Congress mentioned. In this case the defendant packing company was both the shipper and the consignee. And in making such shipment from Kansas City, Kan., to, within, through and beyond this division and judicial district to an Atlantic seaboard port, to be there placed upon an ocean vessel to be carried to a European port, both the defendant packing company, the Burlington company and the connecting lines of railroad, each and all are amenable to the two statutes in question. And if the law has been violated in the facts in evidence under the indictment herein, then this court has jurisdiction to hear and determine the case and render such judgment as your verdict and justice requires.

"And if such shipment of such packing-house products were made from Kansas City, Kan., to the European ports as a through shipment, consigned by the defendant packing company at Kansas City, Kan., to itself at the European port, and this fact was so known by the defendant when it made the shipment, and if this fact was so known at the time by the Burlington company when it received the product, and in turn each of the connecting lines of the railroad and the steamship company knew such fact when receiving such product, then it is not controlling that the receipts, contracts, writings or bills of lading were through contracts or bills of lading.

"It is important for you to determine whether the concession of twelve cents per hundred after August 6 from the rates covered by the schedules then on file with the commission was the result of a device and whether done with guilty intent. It must have been, before you can convict, the result of a device and with a guilty intent, because if the shipper did not know it was receiving concessions and did not have a guilty intent no crime would be

committed. As to device, is meant that which is devised or formed by design, a contrivance, a project, a scheme to deceive, a stratagem or an artifice." (*United States v. Armour Packing Co. et al.* U. S. Dist. Court, Eastern District of Missouri, June 12, 1906.)

§ 24. Criminal Liability — Concessions — Overlapping Contracts.— The Elkins Act renders the person or corporation who receives a rebate liable in the same manner as a person who solicits or accepts such rebate. Criminal proceedings were instituted against both the carrier and the shipper for a violation of the Elkins Act with regard to giving and receiving rebates. The cases were tried before Judge McPherson in Kansas City, Mo., in June, 1906. The shippers were tried first and convicted. See *United States v. Armour Packing Co., supra*. The carrier, to wit, the Chicago, Burlington and Quincy Railroad Company was also found guilty upon the same charge upon which the shippers were convicted, namely, for accepting a rate of twenty-three cents per 100 pounds on shipments of lard consigned to Germany *via* the Burlington railway, after the legal rate was increased to thirty-five cents per 100 pounds. The railroad company contended that the charge was legal because it had made a contract with the shippers to carry for twenty-three cents per 100 pounds, which contract did not expire until the 31st day of December, 1905, although on the 6th of August, 1905, prior to the expiration of said contract the tariff rates were increased from twenty-three cents per 100 pounds to thirty-five cents per 100 pounds. The carrier claimed, therefore, that upon this overlapping contract it had a right to continue to charge but twenty-three cents per 100 pounds. The railroad company claimed that it had a joint rate under its contract with the Clover Leaf and Lehigh Valley railroad to carry the packing-house products at a rate which would have been valid had it been published. They argued that the only crime committed, if any, was the failure to publish the tariff under the contract, while the indictment charged that the defendant granted a concession from a portion of a through rate. That if a concession was made at all it was on the entire or through rate

and reduced the through rate, the amount of such concession, but did not and could not be offered to any fractional part of the through rate. Defendants claimed that the Burlington railroad kept its contract, which was made in good faith and kept in good faith and that, therefore, it was not guilty of giving a rebate as charged in the indictment but was guilty only of failure to publish and file its tariff rate. The United States district attorney answered this contention by saying that the facts disclosed a clear violation of the Elkins Act, because the Burlington Railroad Company had made a contract with the packing company at the rate of twenty-three cents per 100 pounds and had continued to live up to that contract after there had been filed with the Interstate Commerce Commission an amended tariff of thirty-five cents. Judge McPherson charged the jury that the defendant, the Burlington Railroad Company, had no right to make a contract for a period longer than the established rate of twenty-three cents should be in force. That by carrying shipments for twenty-three cents after August 17, 1905, when the tariff was raised to thirty-five cents, was, as matter of law, a concession for which the railroad company was liable under the indictment, and that the failure of the company to file the schedule of twenty-three cents was wholly immaterial. Defendants were convicted. (*United States v. Chicago, Burlington & Quincy Ry. Co.*, tried June 13, 1906.)

VI. COMMERCE ACT—MANDAMUS.

§ 25. Mandamus—Effect of New Legislation as to.—The Interstate Commerce Act was designed to regulate the conduct of the carrier, and to protect the interest of the shipper. In many instances the carrier succeeded in securing unjust preferences in favor of particular shippers, by allowing the use of cars and terminal facilities to those favored, to the exclusion of other shippers. In order to remedy this evil, Congress, by the act approved March 2, 1889, added section 23 to the Commerce Act, thereby giving to the shipper an additional summary and effective remedy by writ of mandamus, to compel the carrier to move

interstate traffic upon equal term to all shippers similarly situated, and to furnish all shippers alike with cars or other "facilities for transportation." Section 1 of the act defines "transportation" as including "all instrumentalities of shipment or carriage." This section was amended by the act approved June 29, 1906, so as to include in the term "railroad" not only bridges and ferries, but "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of persons or property, freight depots, yards, and grounds used or necessary in transportation or delivery of property." The term "railroad," under the amendment, includes "cars and other vehicles, and all instrumentalities and facilities of shipment or carriage." Transportation, the amendment declares, must be furnished by the carrier "upon reasonable request therefor." Section 3 of the act commands the carrier to furnish "equal facilities" for interchange of traffic. Spur tracks, sidings, and switches, under the 1906 amendment, are now expressly included in the terms "transportation" and "terminal facilities" and were designed doubtless to furnish a remedy for such treatment as the shipper received, as shown in the case of *Harp v. Choctaw Railroad*, 125 Fed. Rep. 445, C. C. A. Eighth Circuit, October, 1903, and for which the court could find no remedy. For a report of this case, see "Snyder's Interstate Commerce Act," page 76.

§ 26. **Mandamus — Jurisdiction of Federal Court as to.**— Congress has power to authorize a Circuit Court of the United States to issue a writ of mandamus in an original proceeding. In order to confer power to issue such a writ, the act must be clear and explicit, and will not be construed into the act, and the authority will not be conferred by implication. Prior to 1906, neither section 20, nor section 12 of the Interstate Commerce Act, conferred authority upon a Federal court to issue a writ of mandamus to compel a common carrier to make a report of the matters and things specified in section 20 of the act. A grant of authority to the commission to enforce the act and to institute "all necessary proceeding for the enforcement of the provisions of the

act, will not authorize a summary proceeding by mandamus." (*Knapp v. Lake Shore Ry. Co.*, 197 U. S. 536.)

In view of this decision, Congress, by the act approved June 29, 1906, has given express authority to the court to issue its writ of mandamus to enforce "any of the provisions" of the Commerce Act, or of any act supplemental thereto or amendatory thereof. See section 20 of the Commerce Act as amended 1906.

§ 27. Mandamus — Writ May Fix Percentage of Cars.— Judge Goff, in *United States ex rel. Kingwood Coal Co. v. West Virginia R. R. Co.*, 125 Fed. Rep. 252, held that a shipper could compel the carrier to furnish cars, and that this right could be compelled by mandamus, under section 23 of the Commerce Act (added to the act by Laws 1889, chap. 382, § 10, approved March 2, 1889), and that an alternative writ could be amended even after issue joined. The writ granted by the court fixed the allotment of cars to which relator was entitled. The ruling of Judge Goff was affirmed by the Circuit Court of Appeals. In commenting on the power of the court to fix the percentage of cars, the court said:

"It is insisted 'in a proceeding of this character to fix the percentage of cars the relator should have, and to command that such percentage of cars should be furnished to the relator.' The acts of Congress forbade discrimination and made it unlawful to give any undue or unreasonable preferences or advantage to particular persons, companies, corporations, or localities, or any particular description of traffic, or to subject them 'to any undue or unreasonable prejudice or disadvantage in any respect whatever,' and vested jurisdiction in the Circuit and District Courts to proceed by mandamus as a cumulative remedy for violations of the statutory provisions. * * * We are unable to accept the view that Congress intended to confine the scope of the writ to admonition merely, or to a general command to desist from discrimination, rather than from the particular action in which the discrimination consisted. By the findings, the delivery to the relator of any less than 31

per cent. of the supply amounted to unlawful discrimination, and the judgment of the court did no more than to correct it." (*West Virginia R. R. Co. v. United States ex rel. Kingwood Coal Co.*, 134 Fed. Rep. 198.)

§ 28. Mandamus — Right to Not Affected by Contract With Carrier.—If there is no contract between the shipper and the carrier, and no agreement entered into between them as to the proportion of cars to which the shipper shall be entitled, then the shipper may demand, under the Interstate Commerce Act, section 23 (added March 2, 1889, being section 10 of chapter 382, Laws 1889), and it will be the duty of the court to direct the carrier by a writ of mandamus to discharge the public duty imposed upon it by law, and to move and transport traffic or to furnish cars or other facilities for transportation to the party applying for the writ. (*West Virginia R. R. Co. v. United States ex rel. Kingwood Coal Co.*, 134 Fed. Rep. 198.)

The fact that the carrier made a contract with the shipper, whereby the latter agreed to receive a certain proportion of cars, as its allotment, to be furnished to it by the carrier, will not deprive the shipper of his remedy by mandamus, where the carrier failed to furnish the cars as agreed, and failed to perform the contract with the shipper on its part. It matters not how petitioner's right to an equal distribution of cars may have arisen, whether by contract, statute, or common law. If a contract has been entered into between carrier and shipper, fixing the number of cars to which the latter is entitled, and the carrier fails to perform it, the shipper may resort to a writ of mandamus to compel the carrier to perform its duty under the statute; and the agreement will be considered as in aid of the statute, by fixing, as between the parties, what should be considered and accepted as a compliance with its requirements. (*United States ex rel. Greenbriar Coal & Coke Co. v. Norfolk Ry. Co.*, 143 Fed. Rep. 266. February 6, 1906, Circuit Court of Appeals, Fourth Circuit.)

The duty imposed by law upon a common carrier to furnish the shipper with cars is a public duty. It is a duty im-

posed upon the carrier by its charter, which is the law of its creation. The carrier cannot relieve itself from the performance of this duty by executing a contract with the shipper. The carrier owes a duty to the shipper, irrespective of any contract it may see fit to make with regard to the performance of that duty. The contract would be merely an agreement on the part of the carrier to perform a duty imposed upon it by law. It would be contrary to public policy and natural justice to assume that a common carrier could be freed from the obligation it owed to the public, by making a contract to perform such obligation. If this could be accomplished, the carrier, by its own act, would cease to be amenable to the statute, and could defeat the purpose and intent of the Commerce Act by making a contract and then refusing to perform it, leaving the shipper practically remediless. An action at law by the shipper to recover damages for a breach of the contract, furnishes the latter no adequate remedy, and Congress recognizing this fact gave the shipper a summary remedy of mandamus.

It will be observed further that this remedy was declared by the statute not to be an exclusive remedy merely, but cumulative. It was given to the shipper in addition to any other remedy which he might have, including his remedy for damages against the carrier for the breach of the contract. Section 22 of the Commerce Act in express words declares that nothing in the act contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies." And the new section, known as section 23, conferring upon the court power to issue a writ of mandamus against the carrier, compelling him to move and transport traffic and to furnish cars or other facilities for transportation, contained the provision in express words that the remedy given "by a writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this act, or the act to which it is a supplement."

It is obvious that while the court will not enforce a contract between private parties by mandamus, this rule can

have no application to a contract which is merely declaratory of a public duty imposed upon a common carrier. The duty so imposed remains operative, whether the contract for its performance has been made or not, and such duty, being public, can be enforced by mandamus under the express provisions of the Commerce Act. If this were not the rule, then a carrier could defeat the statute by its own act, by making a contract to do that which the law declares it must do, and then refusing to perform the contract.

VII. COMMERCE ACT — JURISDICTION — EVIDENCE —
REMEDIES — PROCEDURE.

§ 29. Jurisdiction of Federal Courts.— In all cases arising under the Commerce Act, the Elkins Act, and the Sherman Act, the jurisdiction of the Federal courts is exclusive. The subject-matter of these statutes is interstate commerce, over which, under the Constitution, Congress has supreme control. Congress may, if it sees fit, make the jurisdiction of the Federal courts exclusive of the State courts, or, if no provision is contained in the statute excluding jurisdiction of the State courts, either expressly or by implication, they can exercise concurrent jurisdiction with the Federal courts in enforcing the statute. The Judiciary Act of March 3, 1875, as amended August 13, 1888, section 1,* declares that "Circuit Courts of the United States shall have original cognizance, *concurrent* with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States."

These acts, however, were passed after the Commerce Act and the latter is not affected by them. (*In re Hohorst*, 150 U. S. 653; *Railway Co. v. Gonzalez*, 151 U. S. 496.)

If, however, Congress chooses to make the jurisdiction of the Federal courts exclusive by the terms of the act, or such exclusive jurisdiction arises by necessary implication, the

* For text of the statute see Snyder's Interstate Commerce Act, page 154.

State court is barred from the concurrent jurisdiction which it might otherwise have, and the act of Congress can be enforced only in the Federal court. Section 9 of the Commerce Act vests in the District and Circuit Courts of the United States jurisdiction to enforce the remedy of the shipper claiming damages for its violation. Actions and proceedings under the Commerce Act, therefore, derive their authority solely from the statute, and the jurisdiction of the Federal courts under it is exclusive. (*Tift v. Southern Railroad Co.*, 123 Fed. Rep. 789, and authorities there cited.)*

Section 16 of the Commerce Act, as amended June 29, 1906, also provides for a penalty and forfeiture to the United States of \$5,000 for failure to obey an order of the Commission, made pursuant to section 15 of the act; every distinct violation being a separate offense, and continuing violations to be deemed separate offenses.

Section 4 of the Sherman Act authorizes its enforcement by Federal officers in the Federal courts. Section 7 gives the right to any person injured by any violation of its provisions to sue in the Circuit Court of the United States, and authorizes treble damages to be recovered in civil actions by the injured party.

Section 1 of the Elkins Act provides for forfeitures and penalties to the United States for three times the amount of the rebate.

The jurisdiction under these statutes is vested directly in the courts of the United States. They provide also for penalties and forfeitures, as well as civil remedies. Under section 9 of the Judiciary Act of 1789 (U. S. Rev. Stat., § 711), the jurisdiction vested in the Federal courts, "of all suits for penalties and forfeitures, incurred under the laws of the United States," is declared to be exclusive of the courts of the several States. This section of the Judiciary Act, defining the exclusive jurisdiction of the Federal courts, is as follows:

Exclusive Jurisdiction of Federal Courts.—The jurisdiction vested in the courts of the United States in the cases and pro-

* See Snyder's Interstate Commerce Act, page 155.

ceedings hereinafter mentioned, shall be exclusive of the courts of the several States.

First: Of all crimes and offenses cognizable under the authority of the United States.

Second: Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third: Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth: Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

Fifth: Of all cases arising under the patent-right or copyright laws of the United States.

Sixth: Of all matters and proceedings in bankruptcy.

Seventh: Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens. (*U. S. Rev. Stat.*, § 711. *Judiciary Act of 1789, Laws, chap. 20, § 9.*)

The pendency of an action in a State court, seeking relief under the Sherman Act, therefore, is no bar to such an action pending in the Federal court. (*Loewe v. Lawlor*, 130 Fed. Rep. 633. See also under Sherman Act, § 41, page —, *post.*)

§ 30. Jurisdiction Acquired only by Proper Service.—

In proceedings brought to enforce the provisions of the Interstate Commerce Act or of the Sherman Act of July 2, 1890, the court must acquire jurisdiction in the same manner as in any action or proceeding in the Federal courts, by proper service of the papers upon the defendant. The court cannot acquire jurisdiction over the person of a defendant except by actual service of a notice upon him within the jurisdiction, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance, or otherwise, of the want of due service. The plaintiff instituted proceedings in the District Court of the second judicial district of the Territory of New Mexico against the Santa Fé Pacific Railway Company, the Atchison, Topeka and Santa Fé Railway Company, the Colorado Fuel and Iron Company, and the American Fuel Company for alleged violations of the Interstate Commerce Act, and of the

Sherman Anti-Trust Act of 1890. A summons was issued against the Santa Fé Pacific Railway Company, which was served by the United States marshal, within the district, upon E. P. Ripley, president of the defendant corporation. Defendant was organized under an act of Congress, approved March 3, 1897. When Mr. Ripley, the president, was served, he was a passenger on board a railway train passing through the Territory. The company, however, had its principal office in the city of New York. Its land commissioner had an office at Topeka, Kan., and its president had an office in Chicago, Ill. The company had no property in the Territory of New Mexico except lands acquired by it under the foreclosure of a mortgage. It had no office or place of business in the Territory since the sale of its road. Upon a motion in which the defendant appeared especially for the purpose of moving to quash the service of the process, the court held that such service was wholly insufficient to confer jurisdiction upon the defendant corporation, because it had no office in New Mexico, and mere ownership of lands in New Mexico was not sufficient to locate the corporation there for the purpose of a personal action against it, and as there was no law in the Territory of New Mexico authorizing service upon an officer of a corporation other than a domestic corporation temporarily within the jurisdiction, the court held that the service was insufficient and the judgment of the Supreme Court of the Territory of New Mexico affirming the order to quash the return of the summons, and refusing to assume jurisdiction of the action as against the Santa Fé Railway Company, and dismissing an application for a writ of mandamus to compel the court to assume jurisdiction, was affirmed. (*Caledonian Coal Co. v. Baker*, 196 U. S. 432.)

§ 31. **Federal Question.**—Where the record of a case in the State court shows that a Federal question was raised, and, in the absence of an opinion, it appears from a certificate, made part of the record, that it was not raised too late under the local procedure and that it was necessarily

considered and decided by the highest court of the State, a Federal question is presented, which the Supreme Court of the United States may review upon a writ of error. It is enough that the Federal question was raised and necessarily decided by the highest court of the State. (*Cincinnati Packet Co. v. Bay*, 200 U. S. 179.)

§ 32. Appeal Directly to Supreme Court of the United States Under Act of February 11, 1903.—Under the act expediting cases brought under the Interstate Commerce Act, and under the Sherman Anti-Trust Law, in which the United States is a party complainant, approved February 11, 1903, appeals to the United States Circuit Court of Appeals are abolished and the appeal may be taken directly from the Circuit Court to the Supreme Court of the United States. The Act of February 11, 1903 (chapter 544), is entitled “An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled ‘An act to protect trade and commerce against unlawful restraints and monopolies,’ ‘An act to regulate commerce,’ approved February 4, 1887, or any other acts having a like purpose that may hereafter be enacted.” Section 3 of the Elkins Act, approved February 19, 1903, declares that the provisions of the Expediting Act which was passed on February 11, 1903, shall be applicable to “any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.” It was held that an appeal in a proceeding instituted by the Attorney-General of the United States at the request of the Interstate Commerce Commission to procure orders requiring testimony of witnesses to be taken and to procure the production of books, papers, and documents under a complaint filed with the Interstate Commerce Commission against carriers, could be taken directly from the Circuit Court of the United States to the Supreme Court of the United States. (*Interstate Commerce Commission v. Baird*, 194 U. S. 25.)

The proviso in section 3 of the Elkins Act making the

provisions of the Expediting Act applicable to suits prosecuted by the Attorney-General of the United States in the name of the Interstate Commerce Commission was not inserted in any restrictive sense, or to make clear that which might be doubtful upon the general language used. It was inserted for the purpose of enlarging the operation of the statute (Elkins Act), so as to include a class of cases not otherwise within the operation of the section. The court observed (citing *Minis v. United States*, 15 Pet. 423; *Georgia Bank Co. v. Smith*, 128 U. S. 174), that it might be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before. (*Interstate Com. Co. v. Baird*, 194 U. S. 25.)

§ 33. Appeal Directly to Supreme Court Under Court of Appeals Act, March 3, 1891.*— Appeals or writs of error may also be taken from the District Courts or from the Circuit Courts direct to the Supreme Court, pursuant to section 5 of Act of March 3, 1891 chapter 517, establishing Circuit Courts of Appeals “in any case that involves the construction or application of the Constitution of the United States.” In such cases the appeal to the Supreme Court of the United States is authorized by the subject-matter of the litigation, without regard to the diversity of the citizenship of the parties. Where a bill of complaint contains allegations sufficient to make a case of alleged violation of constitutional rights, an appeal may be taken directly to the Supreme Court of the United States, notwithstanding the bill contains an allegation of diverse citizenship, as it appears that the jurisdiction of the court is invoked upon the constitutional grounds recited in the bill. (*Field v. Barber Asphalt Co.*, 194 U. S. 618.)

* For text of this statute see Snyder's Interstate Commerce Act, page 172.

§ 34. Evidence — Documentary Evidence Under Commerce Act.— The Commerce Act, amended June 29, 1906, makes certain reports, contracts, and data filed with the Commission *prima facie* evidence of what they purport to contain, and provides also for certified copies of extracts from official records which may, when so certified, be offered in evidence. The provisions of the act in this regard defines such documentary evidence as follows:

1. Reports and decisions of the Commission are made competent evidence in all courts of the United States. All reports and investigations made by the Commission shall be entered of record and copies furnished. (Commerce Act, § 14.)

2. Orders of the Commission awarding damages, and its findings accompanying the order, are *prima facie* evidence of the facts therein stated, and may be received in evidence on the trial of damage suits, in Circuit Courts of the United States. (Commerce Act, § 15.)

3. Copies of schedules and tariffs of rates, fares, and charges and of all contracts, agreements, and arrangements between carriers, and the statistics, tables, and figures therein contained, and the annual reports of carriers, when filed with the secretary of the Commission, are made public records, and shall be received as *prima facie* evidence of what they purport to be, in all investigations and judicial proceedings. (Commerce Act, § 16.)

4. Copies or extracts from schedules, tariffs, contracts, agreements, arrangements, or reports, which are made public records by the act, shall be received in evidence when certified by the secretary of the Commission under its seal. (Commerce Act, § 16.)

§ 35. Remedies — Orders of Commission — Legislation of 1906.— On and after August 28, 1906, the Interstate Commerce Commission will assume new powers. It is no longer an inquisitorial and advisory body. It is an investigating and prosecuting body, clothed with authority to enforce its orders. Under the Act of June 29, 1906, the carrier, when directed by the Commission to "cease and desist" from doing

the acts specified in the order, must obey or disregard the order at its peril. The statute (section 16) declares that it shall be the duty of the carrier to comply with the orders of the Commission, as long as they remain in effect. The penalty prescribed is a forfeiture to the United States of \$5,000 for each offense. Distinct violations are made separate offenses. Where an order is continuously violated from day to day, each day shall be deemed a separate offense.

The power of the Commission, however, is limited by reason of the fact that it cannot make its order effective immediately. In this regard Congress did not adopt the recommendation of the President in his message, that the law be amended so as to provide that the ruling of the Commission "take effect immediately, and obtain, unless and until reversed by the court." The orders of the Commission, other than orders containing a direction for the payment of money to the shipper by way of damages or reparation, cannot become effective until a period of thirty days after the order is made. The carrier may utilize this period of time as a sort of *locus penitentia* if it intends to obey the order. But if it seeks to review it, the carrier can bring suit in the Federal court to "enjoin, set aside, annul, or suspend" the order. The provision designed to prevent an *ex parte* injunction restraining the enforcement of the order, and declaring that no such restraining order shall be granted, except after a hearing, on not less than five days' notice, will not necessarily operate to prevent the order of the Commission from taking effect until the suit is tried. The hearing to secure an injunction can be heard and decided within the thirty-day period, and if the injunction is granted the order of the Commission will be suspended. The injunction will prevent the order from taking effect after the thirty-day period, when it would otherwise have become operative.

The penalty of \$5,000 per day for failure to obey the order would not ensue, in case the injunction should be denied, within the thirty-day period. If the injunction were denied, and thereafter the order became effective, pending the suit by the carrier to set it aside, the penalty could run only from the time the order became effective. It can

in no case become effective until thirty days have elapsed after the order is made, and then only on the date specified in the order. The Commission may postpone the time of taking effect, to any later period, beyond the thirty days, which it deems reasonable.

§ 36. Orders for Payment of Money — Damages.—

Orders, which the Interstate Commerce Commission is authorized to make, are divided into two classes: (1) Orders for the payment of money; (2) Orders other than for the payment of money. Orders for the payment of money are such as contain a direction to the carrier requiring it to pay money to the shipper or complainant, as compensation for damages sustained, arising from any violation of the Commerce Act, and to make reparation to the complainant. The party aggrieved may elect under section 9, either to sue the carrier for damages in a Circuit or District Court of the United States, or complain to the Interstate Commerce Commission, claiming damages. The remedies are not concurrent and the aggrieved party must elect which remedy he will pursue. More delay will be experienced in enforcing an order for the payment of money, awarding damages by way of reparation, for the reason that the lawfulness of the order must be tested in a trial by jury. On writ of error from a judgment for money damages, entered upon a verdict, the Circuit Court of Appeals can review the rulings of the trial court, and can review the evidence, in order to ascertain whether, as matter of law, it is sufficient to sustain the verdict. (*New York Ry. Co. v. Pennsylvania Refining Co.*, 137 Fed. Rep. 343.) The law, as amended, now allows the shipper to litigate his case without becoming liable for costs. He is not liable for costs, except in case he appeals, and then only for the costs on appeal.

Under section 13 the petitioner may make his complaint. Upon issue joined by the carrier's answer, the Commission may take testimony, and make an award as provided by section 16, and an order directing the carrier to pay the award on or before a day named in the order. If the carrier fails to comply, the complainant must enforce the order by

bringing suit upon it in the Circuit Court of the United States.

In the case cited, *Western New York Ry. Co. v. Pennsylvania Refining Co.*, 137 Fed. Rep. 343, the Circuit Court of Appeals said that the substantial object of an action upon an order for reparation made by the Commission is to obtain the reparation lawfully ordered to be paid. The law allows no appeal from the decision of the Commission denying or awarding reparation, nor does a writ of error lie in such case. The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence, adduced before the Commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation, based on the order of the Commission, it is enough that such facts be established by proper evidence. "Hence," says the court, "in such an action the parties are not confined to the evidence adduced before the Commission during the investigation resulting in the order of reparation. They are at liberty, either wholly or partially, to rely upon the 'findings of fact' made by the act *prima facie* evidence in any judicial proceeding 'as to each and every fact found,' or resort may be had by them or any of them to cumulative or other evidence. The cause of action is examined *de novo* and the proceeding is, in a qualified sense, independent of the investigation by the Commission." (*Western New York Ry. Co. v. Pennsylvania Refining Co.*, 137 Fed. Rep. 343.)

The facts were as follows: the Pennsylvania Refining Company, Limited, of Oil City, Pa., on December 4, 1888, made a complaint to the Commission against the Western New York and Pennsylvania Railroad Company and Samuel G. Decoursey, receiver thereof, and against the Lehigh Valley Railroad Company to recover damages for excessive and unlawful transportation charges upon shipments of oil. After a hearing, the Commission, on October 22, 1895, directed the Western New York and its receiver to pay the claimant \$8,579, with interest from May 15, 1894, and directed the other defendants, New York, Lake Erie and Western and others, to pay the claimant \$343.58, with interest from May

15, 1894. Defendants refused to comply with the orders and plaintiff brought actions thereon in the Circuit Court of the United States for the Western District of Pennsylvania. The cases were tried before a jury, in May, 1902, and plaintiff had a verdict against the Western New York for \$12,706.92, including interest, and for \$514.30 against the New York, Lake Erie and Western and others. Judgment was entered, and defendants sued out a writ of error to the Circuit Court of Appeals. Both judgments were reversed upon technical grounds. One of the grounds was that the complainant failed to obtain an order of court for leave to sue the receiver of one of the carrying companies, notwithstanding the fact that the statute expressly makes the receiver primarily liable.

It appeared that in September, 1888, the freight rates on refined oil in barrels, from the Pennsylvania oil regions to New York, was raised by the carrier to sixty-six cents — a prohibitive tariff. Complaint was made to the Interstate Commerce Commission on December 4, 1888, and in May, 1889, a hearing was had before the Commission. On November 14, 1892, the Commission decided against the carriers, holding that they were guilty of unjust discrimination. A rehearing was granted by the Commission in October, 1893. Upon the hearing on October 22, 1895, damages were awarded to the shippers in the orders above referred to. In May, 1896, the petitioners sued in equity upon the orders in the Circuit Court of the United States for the Western District of Pennsylvania. In July, 1897, the court declined jurisdiction on its equity side, holding that the remedy was upon the law side of the court in an action triable by jury. The case was placed upon the calendar, and was tried and resulted in a verdict by the jury in favor of the refiners, which judgment was entered in February, 1903. These judgments were set aside by the Circuit Court of Appeals in May, 1905, in the decision cited above. After the lapse of seventeen years, the shippers found themselves in about the position they were in when the litigation was begun.

These cases were referred to and commented upon during the discussion of the railway rate bill of 1906, in the Senate,

and doubtless lead to the distinction, in section 16 of the amended act, between orders "lawfully" made and orders "regularly" made. That section provides that if the carrier refuses to obey any order of the Commission, other than an order for the payment of money, the order may be enforced in equity by the Commission upon petition setting forth the substance of the order and the respect in which the carrier has failed of obedience. The section declares that such an order, if found to be "regularly" made, shall be enforced by injunction. If, however, the carrier desires to review the facts *de novo*, and to attack the lawfulness of the order, it must do so in a suit brought in the Circuit Court of the United States against the Commission to enjoin, set aside, annul, or suspend the order. The difficulty with making this provision applicable to an order for the payment of money arises from the fact that a claim for damages must be tried before a jury. In order to protect the shipper, as far as possible, the law provides that the burden of proof is on the carrier to successfully defeat the order before the jury. It is made *prima facie* evidence of the facts therein stated.

§ 37. Order for Damages, how Enforced.—As an order awarding damages is based upon the allegation that the defendant carrier has been guilty of a breach of duty, or a breach of contract, the issue must be tried by a jury, unless jury trial is waived by defendant. An action to recover damages in other words, is an action at law, and not a suit in equity, and section 7 of the Constitution declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." It is necessary, therefore, in order to enforce an order for damages, to sue on the order, and try the case before a jury in the United States Circuit Court for the district where the petitioner resides, or the district in which is located the principal office of the carrier. A petition must be filed stating briefly the facts and the order of the Commission.

The law, however, in such a suit, gives the petitioner a

decided advantage, because he makes his case by putting in evidence the order and findings of the Commission. With these in evidence he may rest his case, because the law (section 16) makes them *prima facie* evidence on the trial "of the facts therein stated." If a recovery is had, the petitioner shall be allowed an attorney's fee to be taxed and collected as part of the costs of the suit. If petitioner is defeated no costs can be awarded against him, unless he appeals, and then in case of an affirmance, he must pay only the costs on the appeal. The petition for damages before the Commission must be filed within two years from the time the cause of action accrues. Suit must be brought on the order within one year from its date.

§ 38. Orders Enforced in Equity.—All orders of the Commission, other than orders for the payment of money, must be enforced in proceedings on the equity side of the court, by injunction or other mandatory process, and in such proceedings the court shall have the powers "ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus." An order for damages must be enforced by the party to whom the damages are awarded or for whose benefit the order is made. An order, other than for the payment of money, may be enforced by the Interstate Commerce Commission or by any party injured. It may be enforced either in a Circuit or District Court of the United States. It must be enforced by petition, setting forth the substance of the order, "and the respect in which the carrier has failed of obedience." The court directs in what manner the facts shall be investigated, and if it appears that the order was "*regularly* made and duly served," and that it has been disobeyed, the court *shall* enforce obedience by injunction or other mandatory process.

This enforcement is summary, for the reason that in such a proceeding the court cannot review the "lawfulness" of the order. It must ascertain only whether the order was "*regularly*" made. In other words, the inquiry will be limited to the question as to whether the Commission had jurisdiction. If it appears that, in making the order, all

the requirements of the statute as to service of papers and opportunity for hearing have been observed, then the Commission had jurisdiction and the order will have been "regularly made."

§ 39. Lawfulness of Order — How Reviewed.—Whether an order of the Commission is or is not lawful cannot be tried in a proceeding by the Commission, or by the party injured, to enforce the order in a court of equity. In a proceeding to enforce the only inquiry presented is, was the order of the Commission sought to be enforced "regularly made?" Did the Commission have jurisdiction to make it? If the order is "regular" it must be enforced.

If the order is sought to be attacked on the merits, and a trial had *de novo* before the court, the proceeding must be instituted by the carrier who fails to obey it, in a suit brought by the carrier against the Commission "to enjoin, set aside, annul, or suspend the order." In this regard, therefore, the distinction under the statute between orders "regularly" made, and orders "lawfully" made, is apparent.

§ 40. Evidence — Burden of Proof — Findings of Commission Prima Facie Evidence.—The Interstate Commerce Act, authorizing investigation and inquiry by the Interstate Commerce Commission, creates a presumption in favor of the correctness of the Commission's report. The Legislature may create rules of evidence and modify or alter or change the same, subject only to the limitations imposed by the provisions of the Constitution. When a body created by an act of Congress is required to take testimony as to the reasonableness of a rate or charge for transportation, the findings and conclusion of the Commission and its report, when offered in evidence in any judicial proceeding, is *prima facie* evidence of all the facts found by the Commission, and the burden of proof is cast upon the party against whom the report is made to rebut the facts and conclusions set forth in the report.

Section 14 of the Commerce Act declares that the "findings of fact set forth in the report of the Commission shall in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found." This rule is repeated in section 16 of the Commerce Act, relating to trial of issues by jury, which declares that at "the trial of the findings of fact of said Commission as set forth in its report, shall be *prima facie* evidence of the matters therein stated." The report of the Commission, therefore, is entitled to such evidential effect that the complainant may introduce the report in evidence and rest his case, and he will be entitled to judgment on the report unless the adverse party, by preponderant and controlling evidence, shall rebut and disprove the findings. (*Lilienthal's Tobacco Co. v. United States*, 97 U. S. 268.)

The Interstate Commerce Commission, which has been entrusted by Congress with the duty of determining, in the first instance, the character of a rate charged for transportation, whether the same shall be reasonable or unreasonable, must be regarded as an expert tribunal. "Our view is," said Hon. EMOY SPEER, "that it would be violation of explicit law, the settled policy of government, and the most practical principles of reason and justice for the courts of the nation, save for controlling reasons of law or fact, to discredit or disparage the conclusions of the Interstate Commerce Commission." (*Tift et al. v. Southern R. R. Co.*, 138 Fed. Rep. 753. June, 1905, Circuit Court, southern district, Georgia.)

§ 40a. Burden of Proof—Drug Trust.—In an action to recover damages under the Sherman Act, by a party injured by an illegal combination, known as the drug trust, the burden of proof is on plaintiff to show the unlawful conspiracy, and that some real, actual damage was sustained by plaintiff by reason thereof. In such a case it is within the discretion of the trial court to admit evidence of acts and declarations of various defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, before a *prima facie* case of conspiracy had been established, and before privity of some of the defend-

ants had been proven, on condition that connecting evidence should be thereafter supplied. (*Loder v. Jayne*, 142 Fed. R. 1010. Circuit Court, eastern district, Pa., Jan. 22, 1906.)

§ 40b. Pleadings Under Sherman Act.—The U. S. Circuit Court for the District of New Jersey, January, 1905, in the *Rice* case, *infra*, held that in a suit to recover damages under section 7 of the Sherman Act, the pleader, in the opinion of the court, was bound by section 110 of the New Jersey Practice Act (P. L. 1903, p. 569) which authorizes the court to strike out a declaration, if it appears to be irregular and defective, and so framed as to prejudice, embarrass and delay a fair trial of the action.

The construction given to the Sherman Act by the court in *Rice v. Standard Oil Co.*, 134 Fed. Rep. 464, was altogether technical, and was based upon the theory that the act in question was a penal and not a remedial statute. That theory has been repudiated by the Supreme Court of the United States, not only as to the Sherman Act, but also as to the Interstate Commerce Act, and the Safety Appliance Law. Justice WHITE in the *Chesapeake and Ohio Case*, 200 U. S. 261, in an opinion concurred in by every member of the court, expressly declared that the Commerce Act was a remedial statute, and, therefore, "entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve." A like construction was given to the Sherman Act in the *Addyston Pipe Case*, 175 U. S. 211; in the *Northern Securities Case*, 193 U. S. 197, and in *Montague v. Lowry*, 193 U. S. 35; and to the Safety Appliance Law in *Johnson v. Southern Pacific Co.*, 196 U. S. 1. In the latter case the court said, that while the statute was in its nature penal, such construction must be given to it as will fairly carry out the legislative intent.

In the *Rice Case*, *supra*, the narrow construction given to the Sherman Act required the pleader to include in his complaint a bill of particulars, and much of his evidence. The court, in order to defeat the pleading, resorted to the technical distinction between a "contract" in restraint of trade, and

a "conspiracy" in restraint of trade, quoting on this point from the dissenting opinion of Mr. Justice HOLMES, in the *Northern Securities Case*. The views in the dissenting opinion relied upon by the court in the *Rice Case*, however, were not adopted in the prevailing opinion concurred in by other members of the court, and was not thereafter followed by Mr. Justice HOLMES in a later case under the Sherman Act, in which he sustained an injunction against the "Beef Trust," writing the opinion concurred in by every member of the court. (*Swift v. United States*, 196 U. S. 375.)

The complaint in the *Rice Case*, after setting forth the combination and conspiracy entered into by defendant, set forth the acts done which resulted in damage to plaintiff, and alleged that defendant and its associates intimidated merchants and others engaged in the business of selling oil in various markets, and thus prevented such merchants and others from purchasing and dealing in oil manufactured by the plaintiff. The plaintiff also alleged that defendants hampered plaintiff in getting the necessary supplies of crude oil, and made the said crude oil more expensive to plaintiff, and hindered, delayed and made more expensive the work of plaintiff in the construction of the pipe line for his use, to his damage.

The court held that the complaint was vague, indefinite and uncertain, in that it did not set forth the names of the merchants or other persons intimidated, the specific acts of intimidation, or the particular markets in which such practice was carried on, or the details as to the manner in which plaintiff was hindered and delayed by defendant, although this information might well have been supplied by a bill of particulars. (*Rice v. Standard Oil Co.*, 134 Fed. R. 464.)

§ 40c. Assignment of Claims — Jurisdiction — Rights of Assignor in Federal Court.—The general rule as to the jurisdiction of assigned claims in the Federal courts, where the claim arose upon contract, is that the assignee cannot maintain his action and the court will not have jurisdiction, unless the suit might have been prosecuted in the Federal court by the assignor, if no assignment or transfer had been made. The exception to this rule seems to be in cases of

foreign bills of exchange and commercial paper made by a corporation.

The act of Congress, conferring jurisdiction upon the Federal courts, U. S. Rev. Stat., section 629, as amended by Act of Aug. 13, 1888, ch. 866, provides as follows:

Jurisdiction as to Assigned Claims.— * * * Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action in favor of any *assignee*, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

Under this rule a "chose in action" not arising in tort cannot be assigned by a resident of the State of which the defendant against whom the cause of action exists is a citizen, to a resident of another State, in order to permit the assignee to sue in the Federal court. In such case, if the cause of action is not one of which the Federal court has exclusive jurisdiction, the assignee cannot sue in the Federal court, because his assignor could not have sued in that jurisdiction. If the assignor and the assignee are both citizens of a State, other than that of which defendant is a citizen, the cause of action can be assigned, and the suit can be maintained in the Federal court by the assignee of the claim upon the ground of diversity of citizenship.

A suit upon contract to recover an amount due from the defendant, which defendant agreed to pay out of funds put into defendant's hands for that purpose, is "a chose in action" within the meaning of the statute which refers to "the contents of any promissory note or other chose in action," and the assignee of such a claim cannot maintain an action upon it in the Federal court if his assignor could not have sued in the Federal court prior to the assignment. (*Mexican Nat. Railroad v. Davidson*, 157 U. S. 201.)

In the case cited the cause of action arose in favor of the assignor, the Mexican National Construction Company, a citizen of Colorado, against the Mexican National Railroad

Company, also a citizen of Colorado. The construction company assigned its claim and cause of action to plaintiff, John A. Davidson, a citizen of the State of New York, who brought suit upon it in the State court, New York county, and secured a warrant of attachment thereon against defendant as a non-resident. Defendant removed the cause into the Federal court, plaintiff and defendant being residents of different States, where plaintiff had judgment. The United States Circuit Court of Appeals on certiorari certified the question of jurisdiction to the Supreme Court. The latter court held that as the assignor, being a citizen of Colorado, could not have sued defendant, also a citizen of Colorado, in the Federal court, his assignee could not, and that upon removal of the action from the State court the Federal court acquired no jurisdiction. (*Mexican National Railroad v. Davidson*, 157 U. S. 201.)

See also same principal, *Plant Investment Co. v. Jacksonville*, 152 U. S. 71; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341; *Shoecraft v. Bloxham*, 124 U. S. 730; *Cross v. Allen*, 141 U. S. 528; *Crawford v. Neal*, 144 U. S. 585; *Metcalf v. Watertown*, 128 U. S. 585; *New Orleans v. Whitney*, 138 U. S. 595.

In an action arising upon tort to recover damages for trespass on lands of plaintiffs' assignor, the statute has no application. One injured party may assign his claim, and the assignee may maintain an action thereon in the Federal court although the other injured party did not assign his chose in action, and the assignor could not have sued the defendant in the Federal court. (*Ambler v. Eppinger*, 137 U. S. 480.)

A municipal corporation is not within the statute, and a cause of action against it may be assigned, and the assignee may bring suit thereon in the Federal court. (*Andes v. Ely*, 158 U. S. 312.)

It was held also that the statute did not apply to a negotiable bond. (*Dodge v. Tully*, 144 U. S. 45.)

§ 40d. Switches on Private Land—Injunction.—A switch was built upon private land to connect with the tracks

of the carrier, the Louisville and Nashville Railroad. The switch led from the quarries of the parties who constructed it, and was used for the purpose of shipping stone. Subsequently the rails and ties and the switch property was transferred to the carrier. Common carriers are *quasi* public corporations, and in accepting their charters they assume and impliedly agree to perform those public duties which the law imposes on common carriers. These duties require them to the extent of their resources to furnish adequate facilities for the transaction of all business offered, and to deal fairly and impartially with their patrons. And these duties may be enforced in equity by injunction. And this law prevailed prior to the passage of the Interstate Commerce Act. (*Munn v. Illinois*, 94 U. S. 126; *McCall v. Cincinnati, Indianapolis, etc., Railroad*, 13 Fed. R. 5.)

By the acceptance of their charters, carriers assume a public trust which clothes the public with an interest in the railroad, in so far as the right of user is involved, which can be controlled by the public to the extent of the interest so conferred.

A common carrier has no right to contract with a corporation or individual to give exclusive rights to transfer any commodity over any part of its line. (*Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. R. 64.)

VIII. CRIMINAL TRUSTS UNDER SHERMAN ACT.

§ 41. Jurisdiction — Action Pending in State Court when no Bar Under Sherman Act.— When suits are pending between the same parties for the same cause in State and Federal courts, the jurisdiction of the latter resting upon diversity of citizenship, a plea in abatement alleging the pendency of one will be futile against the other. (*Gordon v. Guilfoil*, 99 U. S. 168.) But where the State court is without jurisdiction to enforce the remedy sought in the same action pending in the Federal court, the same cause cannot be pending in both. A State court has no jurisdiction to enforce the provisions of the Sherman Act, and the pendency of an action for that purpose is no bar to a suit to enforce the act in the Federal court. (*Loewe v. Lawlor*, 130 Fed. Rep. 633.)

§ 42. Municipal Corporation May Recover Damages Under.— A municipal corporation engaged in supplying its citizens water, gas, or electric light, is “a business corporation,” and under section 7 of the Sherman Act may maintain an action to recover treble the damages which it has sustained by reason of a combination or conspiracy in restraint of trade and commerce in violation of the act. (*City of Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23. December, 1903, C. C. A., sixth circuit.)

The city of Chattanooga operated its own water-works and realized therefrom large profits from sale of water to private consumers. The city, in the conduct of its business, was obliged to purchase large quantities of iron pipe and water mains. It was claimed that the price of this commodity was unlawfully enhanced by defendants, who were subsidiary companies forming part of a trust, by suppressing competition in interstate commerce in the sale of iron pipe. That by reason of such conspiracy plaintiff was compelled to buy pipe from defendants, both Alabama corporations. That defendants agreed with the parent company to pay a “bonus” to the trust in order to get the bid from the city for the sale of the pipe through the instrumentality of fictitious bids. That this bonus was \$15,000, which was added to the purchase price and paid to the trust. That the price was extortionate, and was \$15,000 more than the city would have paid but for the unlawful conspiracy entered into by defendants forming part of the trust. At the trial defendants had a verdict by direction of the court. On appeal this verdict was reversed. The court held that plaintiff, though a municipal corporation, could maintain the action, and that defendants were constituent companies of the Addyston Pipe and Steel Company, which the Supreme Court had declared to be an illegal trust. (*City of Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23.)

§ 43. Measure of Damage Under Sherman Act.— If the members of an illegal conspiracy in restraint of trade are able to prevent competition in the sale of a commodity which is a subject of interstate commerce, and as a result

the price of the commodity is enhanced and plaintiff is obliged to pay the enhanced price for the commodity used in his business, the measure of damages sustained by the business of the purchaser will be the difference between the price paid and the reasonable price of the commodity under natural competitive conditions. This difference, in the case of iron pipe purchased by plaintiff, was held to be \$15,000, shown to be a bonus paid to the trust over and above the reasonable value of the pipe. (*City of Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23.)

§ 44. Liability of Individual Members of a Trust.—The fact that only two members of an unlawful combine are sued for damages under the Sherman Act is not a defense to the action. If the agreement between defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. That if defendants participated in the benefits resulting from a bonus paid to defendants and their associates, who were not parties to the action, they cannot complain that they were sued alone. (*City of Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23.)

§ 45. Statute of Limitations Applicable to Sherman Act.—A suit to recover damages under section 7 of the Sherman Act is not an action for a penalty or forfeiture under section 1047 U. S. Rev. Stat., which declares that a suit to recover a penalty or forfeiture, "pecuniary or otherwise, accruing under the laws of the United States," must be brought within five years. A suit for damages under the Sherman Act is an action to enforce a civil remedy for a private injury, as compensatory damages. Nor does the fact that the damages may be trebled change the nature of the action, such excessive recovery being by way of exemplary damages.

The Statute of Limitations under the Sherman Act is governed by the Statute of Limitations governing actions of a similar character prevailing in the State where the action is brought. (*City of Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23.)

§ 46. **Beef Trust an Unlawful Conspiracy Under.**— The Circuit Court of the United States for the northern district of Illinois in April, 1903, in a suit brought by the United States against Swift & Company and a number of corporations, firms, and individuals of different States engaged in the preparation and sale of meats, held that defendants were engaged in an unlawful conspiracy and combination in restraint of trade and commerce within the meaning of the Sherman Act. The corporations are known as the packers, or the beef trust. They interposed a demurrer in the court below which was overruled and a preliminary injunction was granted restraining the defendants from entering into, taking part in, or performing any contract, combination, or conspiracy as to trade and commerce in fresh meats. The defendants appealed from the judgment below to the Supreme Court of the United States, which affirmed the judgment modifying the injunction appealed from only by striking therefrom the words "any other method or device."* The injunction, as modified, restrains combinations only to the extent of certain specified devices which the defendants are alleged to have used and intended to have continued to use. (*Swift & Co. v. United States*, 196 U. S. 375; *affirming United States v. Swift*, 122 Fed. Rep. 529.)

Mr. Justice Holmes summarizes the bill of complaint as follows: "It charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States; to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards; to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary; to establish a uniform rule of credit to dealers and to keep a blacklist, to make uniform and improper charges for cartage; and, finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But it is alleged that the defendants have each and all arrange-

* For text of the injunction, see Snyder's Interstate Commerce Act, page 289.

ments with the railroads that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition."

The court further observed in sustaining the injunction that although the combination alleged embraced restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. (*Leloup v. Port of Mobile*, 127 U. S. 640, 647; *Crutcher v. Kentucky*, 141 U. S. 47, 59; *Allen v. Pullman Co.*, 191 U. S. 171.) The subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect to such sales.

As to the contention that the bill was too vague and did not set forth a case of commerce among the States, the court said: "Commerce among the States is not a technical legal conception but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit after purchase in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a technical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchaser of the cattle is a part and incident of such commerce." The court observed further that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. (*Swift v. United States*, 196 U. S. 375.)

§ 47. Stock Quotations, when not Within.— There is a property right in market news whose dissemination is helpful to commerce, as quotations of prices on sales of grain and provisions for future delivery, which a court of equity will protect by injunction. Persons who disseminate such news may invoke the protection of a court of equity, and the right to sell such quotations will not be deemed infected

with illegality or beyond judicial protection because the owner of the news maintains an exchange where parties receiving such quotations do not contemplate an actual delivery of the goods whose prices are quoted. Nor will such contracts be deemed illegal because the information is sold to certain persons, and withheld from others, where the persons prohibited from receiving such quotations are what are known as bucket-shops. A business so conducted is not void as against public policy, nor as being in restraint of trade, whether at common law or under the Anti-Trust Act of July 2, 1890, known as the Sherman Act. (May, 1905. *Board of Trade v. Christie Grain and Stock Co.*, 198 U. S. 236.)

The court further held that if plaintiff's collection of information is entitled to protection, it does not cease to be so entitled even if it secures information concerning illegal acts. The statistics of crime are property, to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data. Plaintiff's collection of quotations is like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work if they might, does not authorize them to steal the plaintiff's. (*Ib.*)

§ 48. Sale of Steamboats and Business Carrier, when not Within — Trust — When Contract of Sale of Steamboats is not.—An action was brought by a vendor against a vendee to recover an installment of money due under a contract for the sale of certain steamboats and barges engaged in traffic on the Ohio river. The contract was for the sale of two steamers, two deck barges, two coal flats, and \$500 in the stock of the Coney Island Wharf Boat Company. The contract contained a provision that in case of opposition to the boats sold, by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the installment should be postponed until the opposition ceased. The agreement also contained a

provision that if the opposition continues for two years without interruption, and no actual payment be made, the vendee might cancel the contract. It contained a further agreement that the vendors should not engage in running or in operating, or in any way be interested in any freight or passenger or packet business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points or at and from Syracuse or points between Syracuse and Portsmouth, Ohio, to or from points below Portsmouth, Ohio, for a period of five years. A provision was also inserted that the vendee would maintain the rates charged by the vendor on business above Portsmouth, Ohio, said rates, however, never to exceed present rates between said points. It was claimed that this contract was not within the condemnation of the Sherman Act because it did not in terms relate to Interstate Commerce. The court held, however, that even if it did contemplate interstate commerce, it would not be in violation of the Sherman Act for the reason that the provisions of the contract were merely incidental to the sale of a business, and were not and could not be construed as a device to control commerce within the meaning of the Sherman Act. The court said the agreement to maintain the rates was not the covenant sued upon and did not form part of the consideration of the sale. (*Cincinnati Packet Co. v. Bay*, 200 U. S. 179.)

§ 49. Sale of Mercantile Business and Good Will, when not Within.—An agreement by the seller of property, or of a particular business, not to compete with the buyer for a specified period of time (ten years), in such a way as to impair or compete with the business sold, is not a contract in restraint of trade and commerce within the purview of the Sherman Act. (*Booth & Co. v. Davis*, 127 Fed. Rep. 875. Circuit Court, eastern district, Michigan, January 19, 1904.)

In the case cited complainant sought to enjoin defendant Davis from violating his contract with plaintiff not to engage directly or indirectly in the fish business, and to re-

strain defendant, the Wolverine Fish Co., Limited, from benefiting in any way by the services and experience of defendant Davis. Plaintiff purchased the property and goodwill of the Davis Company, a Michigan corporation, and the corporation and all of its officers and stockholders, as part of the contract of sale, agreed not to engage in the business for ten years. Defendants claimed that the contract of sale was void under the Sherman Act, and that such contracts were also prohibited by the Michigan Anti-Trust Act of June 23, 1899.

The injunction was granted on the ground that the contract was not within the Sherman Act, and that the Michigan Anti-Trust Act, in force in 1889, when the sale was made, was repealed in 1899, when a new Anti-Trust Act was passed. The new statute was passed after the sale was consummated, and the court held that it was not retroactive in its operation. (*Booth & Co. v. Davis*, 127 Fed. Rep. 875.)

§ 50. Agreement not to Sell Goods Outside the State not Within Sherman Act.—It was not the purpose of the Sherman Act to prohibit ordinary contracts or combinations of manufacturers, or the usual devices to which they resort to enhance their trade and make their occupation gainful, so long as they do not directly restrict competition in commerce among the States. A Kansas corporation engaged in the manufacture and sale of cement at Iola, Kan., sold to defendant and his firm 50,000 barrels of cement to be shipped free on board at Iola to Galveston, Tex., at \$1.20 per barrel. Defendants agreed "not to sell said cement, ship same, or allow same to be shipped" outside the State of Texas. Part of the cement was received and paid for; the remainder defendants refused to receive or pay for. In a suit for the price the defense was that the contract of sale was void under the Sherman Act. *Held*, that the agreement of sale imposed no direct restriction on competition in commerce among the States, and was valid and not within the prohibition of the Sherman Act. (*Phillips v. Iola Portland Cement Co.*, 125 Fed. Rep. 593. Novem-

ber, 1903.) See also *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454.

§ 51. **Illegal Contract Under — When not Enforceable— Rights of Parties.**— Neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. Where the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff by the conveyance of property or by the payment of money and has not been repudiated by defendant, it is well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. So held where the plaintiff sought to recover back stocks and securities sold by him to the defendant under a contract which had been adjudged void as in violation of the Sherman Act known as the railroad merger, which was declared to be illegal. (*Northern Securities Co. v. United States*, 193 U. S. 197.) The court applied the maxim *in pari delicto potior est conditio defendentis*, notwithstanding the fact that the parties claimed to have acted in good faith and without intention to violate the law. With knowledge of the facts and of the statute, neither can plead ignorance of the law as against the other, and defendants secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed. (*Harriman v. Northern Securities Co.*, 197 U. S. 244.)

§ 52. **Book Trust — Copyright — Blacklisting Void Under Sherman Act.**— A combination of publishers and booksellers was formed in two associations, known respectively as the “American Publishers’ Association” and the “American Booksellers’ Association.” They controlled

90 per cent. of all copyrighted books. The object of the combine was to fix prices, and to compel publishers and dealers to sell at the prices so fixed. The compulsion was brought about by blacklisting those who refused to be governed by the combine as to prices, and by refusing to such the privilege of purchasing, owning, or selling copyrighted books controlled by the associations, thus injuring, and in some instances destroying, the business of dealers outside the combine. The agreement under which such associations were formed, so far as they related to interstate commerce, were declared to be null and void within the provisions of the Sherman Anti-Trust Law. (*Bobbs-Merrill Co. v. Straus et al.*, 139 Fed. Rep. 155. February, 1905, Circuit Court, southern district, New York.)

In the case cited the complainant sought to enjoin defendants from selling at retail a copyrighted novel entitled "The Castaways" at less than \$1 per copy. The defense interposed was that defendants purchased the books in the open market and acquired title to them, and had a right to sell them at any price they chose. Defendants claimed also that the suit was brought by plaintiffs to enforce an agreement in restraint of trade and commerce which was void under the Sherman Act.

The court held that if a publisher of a book, being the proprietor of the copyright, parts with the title to the book, either a single copy or a number of copies, and receives his pay therefor, he has parted with all control over such books, and the purchaser can sell them in the open market for any price he chooses. The court held further that while it is no defense to a trespass upon complainants' rights that it has violated or is violating the Sherman Anti-Trust Law (*General Electric Co. v. Wise*, 119 Fed. Rep. 922), yet if it appears that complainant has turned over to the illegal combine the fixing of prices, and has become a member of such unlawful combination, and is attempting to enforce the illegal agreements of such combination, the action cannot be maintained. A plaintiff cannot use the courts to enforce agreements forbidden by law. He that comes into equity must come with clean hands. The facts before the

court having shown that defendant had absolute title to the copyrighted books sold by it, and that the suit was, in effect, an attempt to enforce the rules of a trust prohibited by law, the complaint was dismissed. (*Bobbs-Merrill Co. v. Straus*, 139 Fed. Rep. 155.)

§ 53. Book Trust — When Owner of Copyright can Control Sale.— The publisher of a book, who also owns the copyright, can control the conditions upon which the book shall be sold only so long as he retains title to the copies of the work. In the exercise of such ownership he can lawfully restrict the manner in which, and the persons to whom, the book can be sold. Such restrictions being protected by the copyright could not be said to be an unlawful restraint of trade under the Sherman Act. The right to restrain the sale, however, is gone when the owner of the copyright or copyrighted work has parted with title to the books, and confers absolute title on the purchaser, even if the sale be accompanied with an agreement for restricted use, or for a sale at a fixed price. Under such an agreement a contractual relation arises, and the remedy, if any, is for damages for its breach. But where title passes to the vendee of the copyrighted book, or books, the vendee cannot be restrained by injunction in an equity suit from disposing of them. (*Scribner v. Straus*, 139 Fed. Rep. 193. July 1905, Circuit Court, southern district, New York.)

§ 53a. Patent Right will Protect Trust.— The fact that the subject matter of a monopolistic combination is covered by patent-rights, will, if there be no illegality in other respects, protect the combination from the penal provisions of the Sherman Act. If the use of the patented articles does not infringe upon the police powers of the State, the patent will be upheld, even though the effect be to keep up a monopoly and fix prices. (*Bement v. Nat. Harrow Company*, 98 U. S. 70.)

“The very object of the patent laws,” says PECKHAM, J., in the case cited, “is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very

nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts." The fact that the tendency will be to control prices of the patented article will not render such contracts void, as in restraint of trade within the provisions of the Sherman Act. (*Bement v. Nat. Harrow Co.*, 98 U. S. 70.)

It was held, however, that where the patentee of an invention for the manufacture of rubber tire went beyond the rights secured to him by his patent in raising and maintaining prices in States where the patent had no practical existence, and in raising a fund to crush competition by outside manufacturers in localities where the patent was in force, as well as in those where it had no practical existence, such contracts were within the purview of the Sherman Act as a conspiracy in restraint of trade, and void. (*Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 142 Fed. R. 531. Jan. 23, 1906, Circuit Court, Wisconsin eastern district.)

§ 54. Boycott — Conspiracy to Boycott Restrained by Injunction.— Under the Sherman Act every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is forbidden. Such unlawful contracts and conspiracies may be restrained by injunction. A combination and conspiracy having for its immediate object the injury and destruction of the private business of an individual, firm, or corporation by means of a boycott is an unlawful conspiracy at common law, and may be restrained by injunction. Such a combination and conspiracy does not lose its criminal character, or become lawful, by reason of the fact that the acts contemplated and done pursuant thereto might be lawfully done by an individual acting for himself alone. (*Lowe v. California State Federation of Labor et al.*, 139 Fed. Rep. 71. July, 1905, Circuit Court, northern district, California.)

The case cited arose upon a motion to continue a temporary injunction *pendente lite* issued in an action by plaintiffs, a firm of hat manufacturers of Danbury, Conn., against the

California State Federation of Labor and others, to restrain the defendants from in any manner conspiring together to destroy the trade and business of complainants; from boycotting the complainants' business, or the product of their factory; from publishing or otherwise circulating statements of representations calling the attention of complainants' customers, or of dealers, or of tradesmen, or of the public to a boycott or strike against the complainants, from threatening or intimidating the customers of complainants, or the public, or persons combined with complainants, or persons buying products of complainants' factory from any other person, firm, or corporation by any means set forth in the bill of complaint.

The contention of defendants was that a single individual, acting on his own responsibility, might do the things complained of, and that in so doing he would not be guilty of any unlawful act; and that, therefore, what was lawful for an individual to do does not become unlawful by reason of the fact that the acts complained of are done by a number of individuals. The court held that this contention was wholly untenable, and made the distinction between the results of concerted action by means whereof an individual is deprived of his just rights, as distinguished from the acts of an individual which result in harm to no one. The intention by one man, so long as he does nothing, is not a crime which the law will take cognizance of, and so, too, the intention of any number of men acting separately. But when several men form the intention, and come together and agree to carry their intent into execution, the case is changed. The agreement is a step in the direction of accomplishing the purpose. The combination becomes dangerous and subversive of the rights of others, and the law says it is a crime. On this point the court cited from an opinion by Mr. Justice HARLAN in *Arthur v. Oakes* (63 Fed. Rep. 310; s. c., 11 C. C. A. 209), as follows:

"It is one thing for a single individual or for several individuals, each acting upon its own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing,

in the eye of the law, for many persons to combine or conspire together with the intent not simply of asserting their rights, or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

The court also cited from the opinion of Mr. Justice HOLMES in *Aikens v. Wisconsin* (195 U. S. 194), in construing a Wisconsin statute forbidding "two or more persons to combine for the purpose of unlawfully and maliciously injuring another in his reputation, trade, business, or profession by any means whatever." In that case the court said that the liberty to combine to inflict injury upon another was not among the rights which the Fourteenth Amendment was intended to preserve, and that the defense that motives are not actionable cannot prevail in determining the extent to which a person can justify harm which he has foreseen. If the acts were intended and the injury foreseen, it is no defense to say that motives are not actionable. The court continued the injunction. (*Lowe et al. v. California State Federation of Labor et al.*, 139 Fed. Rep. 71. July, 1905, Circuit Court, northern district, California.)

§ 54a. Blacklisting Prohibited as to Employees of Carriers Engaged in Interstate Commerce.—National Trades Unions, and controversies between carriers and their employees are governed by an act of Congress, approved June 29, 1886, entitled "An Act to legalize the incorporation of Trades Unions" (Laws 1886, ch. 567); and also by an act approved June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employees." (Laws 1898, ch. 370.)

Section 3, of the act of 1898, provides for a board of arbitration to settle disputes and controversies between employer

and employee. Section 10 of this act makes it a misdemeanor for the carrier to require the employee to agree "not to become or remain a member of any labor corporation" or organization as a condition of employment, or to threaten loss of employment, or to discriminate, because of membership in any labor corporation or organization; or who, having discharged an employee shall "attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment."

It is declared by section 8 of this (1898) statute that every national trade union must embody in its articles of incorporation "and in the constitution, rules and by-laws," a provision that a member "shall cease to be such by participating or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working, through violence, threats or intimidation." The section declares that members "shall not be personally liable for the acts, debts, or obligations of the corporations, nor shall such corporations be liable for the acts of members or others in violation of law."

§ 54b. Injunction of Proceedings in State Court When Forbidden.— Congress, in order to secure the orderly administration of proceedings pending in State courts, as to matters concerning which the Federal courts have no jurisdiction, has forbidden the latter to issue an injunction to stay proceedings in the State courts, unless proceedings in bankruptcy are involved. The Federal statute in this regard is as follows:

Injunction as to State Courts.— The writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. U. S. Rev. Stat., § 720.

This provision of the United States revised statutes was construed and commented upon, in regard to proceedings in the State courts of Kentucky, which were stayed by the Federal court, in the case of *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. R. 64.

IX. STATE ANTI-TRUST LAWS — COMMON-LAW TRUSTS.

§ 55. State Anti-Trust Laws.— Congress can legislate only as to interstate commerce. The power conferred by the Constitution authorizes it to regulate commerce among the several States. It has no power to legislate with regard to commerce conducted wholly within the borders of a State. Power to forbid trusts, contracts, combinations, or conspiracies in restraint of trade within State lines resides in the State Legislature. Since the passage of the Sherman Act, approved July 2, 1890, known as the Sherman Anti-Trust Law, which prohibits every contract, combination in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several States, Legislatures of various States of the Union have, from time to time, enacted similar laws prohibiting conspiracies in restraint of trade within the borders of the respective States. Many of these State laws have been sustained and declared valid by the Supreme Court of the United States.

In a number of States, however, no anti-trust laws have been enacted, and the question constantly arising is, how far monopolies or criminal conspiracies to enhance the price of necessities of life, can be punished criminally in those States where the common law prevails, and in which no statutes have been enacted to punish unlawful conspiracies in restraint of trade and commerce.

§ 56. Federal Courts Cannot Punish Common-Law Trusts.— Under the Judiciary Act of 1789 (U. S. Rev. Stat., § 711), *supra* (§ 40), the Federal courts have exclusive jurisdiction over "crimes and offenses cognizable under the authority of the United States." The Constitution authorizes Congress to punish three classes of crimes: (1.) Counterfeiting. (2.) Piracies and felonies on the high seas. (3.) Treason. The Federal courts, however, although courts of general jurisdiction, are also courts of limited jurisdiction in the sense that they cannot punish crimes, except such as are defined by Congress, which must designate the crime and fix the punishment because they

possess no common-law jurisdiction over crimes. (*United States v. Hudson & Goodwin*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat. 415; *Wheaton v. Peters*, 8 Pet. 591; *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518.)

The Judiciary Act of 1789 did not establish a Penal Code. That legislation is contained in the Crimes Act of April 30, 1790, U. S. Rev. Stat., Title LXX. That act contains no provision making monopolies and criminal conspiracies in restraint of interstate trade and commerce crimes. No Federal statute on that subject was passed until Congress enacted the Sherman Act, approved July 2, 1890.

While there is no Federal common law with respect to crimes, the common law in so far as it relates to civil actions, both at law and in equity, will be administered in the Federal courts. They will enforce the common law as they find it in the respective States as adopted and modified by the State in which the Federal court is sitting, unless the rule has been superseded by an act of Congress upon the subject. (*U. S. v. Lancaster*, 2 McLean, 431; *U. S. v. Wiltberger*, 5 Wheat. 76; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 18; *Wheaton v. Peters*, 8 Pet. 591; *U. S. v. Burr*, 2 Rob. 481; *U. S. v. Worrall*, 2 Dall. 384.)

The settled rule is, therefore, that the common law in criminal cases cannot be administered in the Federal courts, and their jurisdiction does not extend to offenses unless they are made crimes by an act of Congress.

This rule as to the enforcement of the common law in civil cases, rests upon the principle that in so far as the common law has been adopted by a State, it becomes part of the local law and of the jurisprudence of that State, and in justice to its citizens, and to enforce their civil rights, Congress has expressly commanded that the Federal courts shall enforce the laws of the several States unless in conflict with the Constitution or laws of the United States. The statute (U. S. Rev. Stat., § 721), provides as follows:

Laws of the States in Federal Courts.—The laws of the several States, except where the Constitution, treaties, or statutes of the

United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (*U. S. Rev. Stat.*, § 721.)

Congress by this statute, subject to the qualifications of the act, has adopted the common law which has been adopted in the respective States, and has conferred upon the Federal courts authority to apply such common law in the States where it is invoked in civil actions. The Federal courts, however, are not bound to follow the construction put upon the law by the State courts, but have a right to construe it according to their judgment as to its meaning and interpretation. If a right is claimed in a Federal court based upon principles of the common law, reference must be made to the common law of the State where the Federal court is sitting in which the controversy arose. Whether such common-law rule relied upon exists, and the extent or limitation of the rules, must be determined by the judicial decisions, statutes, if any, and the usages and customs thereof. If the common-law rule exists as claimed, and is applicable to the case, and is not abrogated or superseded by the Constitution, or a law or treaty of the United States, it will be the duty of the Federal court to regard it as a rule of decision in the Federal court.

An illustration of this principle is shown in *United States v. Garlinghouse*, 4 Ben. 194. Mrs. Garlinghouse, a married woman, was engaged in business as a distiller in the State of New York. She executed a bond to the United States in the penal sum of \$20,000, conditioned upon her compliance with the warehouse and internal revenue laws. In a suit upon the bond in 1870, defendant pleaded her coverture as a defense, and claimed that, being a married woman, she had no legal capacity to execute the bond. She argued that at common law the bond was void. The answer was that under the laws of the State of New York defendant, though a married woman, was authorized to engage in business as a distiller on her own account, for her own benefit, and was competent to execute the bond under the New York statute. The court, therefore, held the bond to be valid

under the *lex loci contractus*. That the common-law rule was binding on the Federal court only in so far as it existed or had been modified or abrogated by the State of New York where the contract arose, and where the action was tried. That the common-law rule as to married women had been so far modified in that State as to remove the disability of a married woman as to her separate business, and authorized her to engage in business on her own account, and that under the statutes of New York defendant was not disqualified to execute a bond in connection with her own business.

The courts of the United States have never adopted the common law as a whole, by any general rule of court, and have no power to do so. "And yet," says Mr. SPEAR, in his work on the Federal Judiciary, "in the disposal of civil cases relating to legal rights and their remedies, these courts have, from the commencement of the government, looked to the common law as a repository of doctrines and principles to which they might refer for the purpose of understanding the meaning of statutes and constitutional provisions, and which, in the absence of statutes directing them, or otherwise requiring, they might adopt, and apply, as containing pertinent and proper rules for their guidance in the exercise of the powers conferred on them by express law, and in determining questions relating to the rights of the parties in the cases pending before them."

§ 57. Common Law, as to Trusts and Conspiracies in Restraint of Trade.—The Federal courts have no jurisdiction over crimes and offenses, other than those cognizable under the laws of the United States. Congress has no power to legislate with respect to trade or commerce carried on wholly within the borders of a State. In the absence of a State Anti-Trust Law, therefore, the only redress is the common law, under which a conspiracy to control the price of necessities of life is an indictable offense. Sir William BLACKSTONE, the most distinguished commentator on the common law of England, says that criminal conspiracies in restraint of trade and

commerce were defined as the offense of "forestalling the market," the offense of "engrossing" and "monopolies."

The offense of "forestalling the market" would, in modern parlance, be declared a trust, as it relates to public trade generally, while "engrossing" was confined to bread-stuffs and victuals. Blackstone declares that the offense of forestalling the market, and of engrossing, were offenses at common law, indictable and finable. He says the offense is described by Statute 5 & 6 Edward VI., chap. 14, "to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there; any of which practices make the market dearer to the fair trader." (Book IV, page 158.) Engrossing he defines as "buying up large quantities of corn or other dead victuals with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion." The punishment for these offenses, as in other minute misdemeanors, was, at common law, discretionary fine and imprisonment. (1 Haw. P. C. 235.) Monopolies, he declares, are contrary to public policy and void.

Criminal conspiracies at common law were defined by Lord MANSFIELD, one of England's greatest judges, on a motion made before him for leave to file an information against defendants for conspiracy to raise the price of salt. The defendants owned salt works at Droitwich, and were charged with raising the price of that commodity. The motion was granted. In his opinion, granting the motion, LORD MANSFIELD observed: "If an agreement was made to fix the price of salt, or any other necessary of life, by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to show their sense of the crime, and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements are of bad consequence and ought to be discontinued." (*King v. Morris*, 2 Kenyon's Notes of Cases, 300.)

It has been held that this rule of the common law still prevails in the United States, in those States which have enacted no statutory regulations governing the subject. The modern cases, and later authorities, fully sustain the doctrine that any association of two or more persons combining for the dishonest purpose of creating monopolies in those commodities which comprise the necessities of life, or to enhance their market price, to the prejudice and injury of the general public consumer, is a criminal conspiracy at common law, subjecting the offenders to fine and imprisonment. In States where there are no statutes, or Anti-Trust Laws punishing conspiracies in restraint of trade, this rule of the common law has been frequently applied. (*Commonwealth v. Carlisle*, Bright's N. P. (Pa.) 36; *Commonwealth v. Miskey*, 15 Phila. (Pa.) 356; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75; *People v. The Milk Exchange*, 145 N. Y. 267; *People v. Sheldon*, 139 N. Y. 251; *People v. Fisher*, 14 Wend. 9.)

In the Illinois case, defendants were indicted for conspiracy to regulate and fix the price of coal. In September, 1902, they fixed the price at \$2.90 a ton. In the following month, October 13, 1902, they increased the price about \$1 a ton. Defendants were held guilty of conspiracy, and the court, among other things, observed: "All combinations among persons or corporations, for the purpose of raising or controlling the prices of merchandise or any of the necessities of life, are monopolies. * * * Where the act to be done by such combination necessarily tends to prejudice the public, or to oppress individuals, the combination has always been held to be criminal."

The plea that a trust may be beneficial because the result may reduce, or does reduce, the price of the commodity, was answered by the New York Court of Appeals in the *Milk Exchange* case (145 N. Y. 267), by this pertinent observation:

"It may be, as claimed, that the purpose of the combination was to reduce the price of milk, and that it being an

article of food, such a reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination, was to paralyze the production and limit the supply, and thus leave the dealers in the position *to control the market*, and, at their option, to enhance the prices to be paid by the consumers. This brings the case within the authorities to which we have referred."

A reference to the Anti-Trust Laws of the various States are given *infra*, indicating those, also, in which the common law prevails. The authorities in those States which have no statute bearing on the subject will be obliged to resort to the common-law rule to invoke a remedy for criminal conspiracies in restraint of trade to control the price of the necessities of life.

§ 57a. State Anti-Trust Laws Upheld.—A State has power to enlarge the rule of the common law, and to prohibit combinations in restraint of trade within its borders, where such combinations limit competition in the production or sale of articles, or increase or reduce prices, in order to preclude free and unrestricted competition. The Legislature of a State has power to declare that competition, and not combination, shall be the law of trade. It may lawfully prohibit combinations to control prices. Held accordingly that a State Anti-Trust Law, containing such provisions (Laws of Texas, 1889, 1895, and 1899), was constitutional and binding, and did not deprive persons of property without due process of law. (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.)

§ 58. Kansas Anti-Trust Law Sustained.—The Supreme Court of the United States has held that a State has power to pass a law forbidding persons within its borders to combine with others or to create a pool to fix the price of necessities of life, to divide the net earnings, and to prevent competition in the purchase of such articles, and sustained an act of the Legislature of the State of Kansas, passed for

that purpose, on the 8th of March, 1897. The act in question provides as follows:

Kansas Anti-Trust Act.—Sec. 1. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes: First.—To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State. Second.—To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance. Third.—To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce. Fourth.—To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State. Fifth.—To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void." (*Laws of Kansas*, 1897, p. 481.)

The defendant was convicted by a jury under this statute for combining with others to fix the price of grain, to divide the net earnings, and to prevent competition in the purchase and sale of grain. The court sustained the validity of the Kansas statute, and held that its provisions were not in conflict with the Fourteenth Amendment to the Federal Constitution. The court held that there was a certain freedom of contract which cannot be destroyed by legislative enactment, and that it is not always easy to draw the line between

those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. The court observed, however, that "a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community, in one of the necessities of life, is substantially destroyed without any merging of interests, through partnership or incorporation, is one to which the police power extends." The court observed further that the defendant could not object to the statute merely because it operated oppressively upon others. The hurt must be to himself." (*Smiley v. Kansas*, 196 U. S. 447.)

§ 59. Missouri Anti-Trust Law — Purchaser Relieved in Suit by the Trust.— One of the most drastic provisions of State anti-trust legislation is that which seeks to relieve a purchaser from liability for goods purchased from the trust. The law authorizes the purchaser, in an action brought by the trust to recover the price of goods, to plead that plaintiff is a trust, as a complete defense to the action. This provision will be found in the laws of many States. It is incorporated in the Missouri statute, which provides as follows:

"Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this article shall not be liable for the price or payment of such article or commodity, and may plead this article as a defense to any suit for such price or payment." (*Laws 1891, chap. 143. Mo. Rev. Stat. 1899, § 8977.*)

In an action brought in the Circuit Court, City of St. Louis, by the Cahill-Swift Manufacturing Company against Joseph F. Walsh, to recover the value of materials furnished the defendant, the latter set up as a defense to the action, that plaintiff was a member of a "trust" or conspiracy in restraint of trade, known as the "Plumbers' Trust." The case was tried before Judge Ryan on the 25th of June, 1906, who sustained the defense under the provision of the Anti-Trust Law above quoted, and held that the plaintiff could not recover the price of the goods sold, even although

it was shown that the price demanded was the reasonable worth and value of the materials. As yet there has been no decision of any appellate tribunal as to the validity of this particular phase of anti-trust legislation.

The validity of a provision of this character has not, as yet (July, 1906), been directly passed upon by the Supreme Court of the United States.

The question arose, indirectly in action, under the Anti-Trust Law of Illinois, approved June 20, 1893, containing a similar provision to that contained in the Missouri statute, relieving the purchaser from liability, in a suit by the trust, to recover the purchase price of goods sold. (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.) In that case, however, the Anti-Trust Law of Illinois was declared unconstitutional, for the reason that, by its terms, it was made applicable to certain persons and products, and inapplicable as to others, namely "agricultural products, or live stock, while in the hands of the producer or raiser." (See *Connolly Case*, *infra*.)

It might be claimed, successfully, that such a statute deprives a person of his property without due process of law. The parties may not be *in pari delicto*. But a suit at law is not a proceeding in equity and it might be urged that the only remedy for engaging in a criminal conspiracy in restraint of trade, in addition to fine and imprisonment and possibly confiscation, would be by injunction and dissolution of the trust. The law may also properly provide that an injured party may sue the trust for the injury which it has occasioned, and may recover treble damages. The punishment by fine and imprisonment, or by confiscation or forfeiture, is inflicted as between the public and the offender, as the confiscation inures to the State, as provided in section 6 of the Sherman Act and in section 76 of the Wilson bill, which is still in force.*

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, above referred to, the pipe company, an Ohio corporation,

* For text of the Sherman Act and of the Wilson Bill, see Snyder's Interstate Commerce Act, pages 298 and 305.

doing business in Illinois, sued Connolly, a citizen of Illinois, to recover upon notes given by defendant to secure the purchase price of pipe sold by the company to Connolly, and also to recover the purchase price of pipe due upon open account. The defense was that the pipe company was a trust, and an illegal combination at common law; that it was a trust within the purview of the Sherman Act, and finally that it was a trust carrying on business as such in violation of the Illinois Anti-Trust Law of June 20, 1893. The latter act contained a provision whereby a purchaser, sued by the trust for goods sold, might be relieved of his purchase, and in a suit to recover for goods sold might plead the statute as a defense to the action. The several defenses were overruled, and plaintiff had judgment, which was affirmed by the Supreme Court of the United States, in 184 U. S. 540. As to the Anti-Trust Law of Illinois, the court said that as its provisions were applicable to certain persons, and inapplicable to others, because section 9 of the act declared that its provisions "shall not apply to agricultural products, or live stock while in the hands of the producer or raiser," the act was repugnant to the Fourteenth Amendment, as denying to some within its jurisdiction of "the equal protection of the laws." On this ground the Illinois statute was held to be unconstitutional and void. (*Connolly v. Union Sewer Co.*, 184 U. S. 540.)

The same defense was interposed under the Anti-Trust Law of Missouri, Rev. Stat. Mo., 1899, §§ 8965, 8970. The defenses as to the common law, and the Sherman Act were overruled, on the authority of the *Connolly Case*, *supra*. As to the Missouri Anti-Trust Act, the court held that it could not apply to a contract for the sale of goods to be manufactured by the vendor in another State (Pennsylvania), and delivered to the vendee in Missouri, because such a contract relates directly to interstate commerce, to which the law of Missouri could have no application. (*Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. Rep. 242. Circuit Court of Appeals, Eighth Circuit, January 19, 1906.)

A provision similar to that contained in the Missouri statute, *supra*, will be found in the Anti-Trust Law of Illinois (Act of June 11, 1891), and it was held that in an action for goods sold the defense that the seller was a trust could not be sustained. That the issue tendered by plaintiff in such an action could not be met by a *collateral* issue, involving the question as to whether the plaintiff or seller was a trust or combination or a member thereof, within the statute. That before such a defense could become available there must be instituted a direct proceeding before a competent tribunal, brought for the purpose of determining whether the seller is an unlawful trust or a member of an unlawful combination within the statute. (*Lafayette Bridge Co. v. City of Streator*, 105 Fed. Rep. 729.)

X. STATE ANTI-TRUST LAWS ENUMERATED.

§ 60. State Anti-Trust Laws Enumerated.—The condition of State legislation, throughout the United States, bearing on the subject of trusts and conspiracies in restraint of trade and commerce, will appear by a reference to the statutes in force January, 1906, in the various States, as follows:

Alabama.—Laws 1903, chap. 395, approved October 2d, confers and limits powers of business corporations. Contains no special anti-trust provisions. Act approved Sept. 26, 1903, chap. 329, prohibits boycotting, picketing, and blacklisting.

Alaska.—Governed by the provisions of the Sherman Act, approved July 2, 1890. Section 3 of the act extends its provisions to the Territories and to the District of Columbia.

Arizona.—Governed by the provisions of the Sherman Act, approved July 2, 1890. Section 3 of the act extends its provisions to the Territories and to the District of Columbia.

Arkansas.—Acts of March 16, 1897, and March 6, 1899. Similar to the Georgia act. Penalty, fine and imprisonment. Act of 1899 provides for fine only.*

California.—Civil Code of California, § 1673, declares that "every contract by which any one is restrained from exercising

* These penalties are in addition to penalty forfeiting charter of domestic and banishment of foreign corporation, which are included in nearly all the laws.

a lawful profession, trade, or business of any kind, otherwise than as provided in the next two sections, is to that extent void."

The two sections referred to relate to transfer of partnership and good-will, and agreements not to carry on similar business in same city or town.

Colorado.— Governed by the rules of the common law. No statute up to 1906.

Connecticut.— Governed by the rules of the common law. No statute up to 1906.

Delaware.— Governed by the rules of the common law. No statute up to 1906.

District of Columbia.— Governed by provisions of the Sherman Act, approved July 2, 1890. Section 3 of the act extends its provisions to the District of Columbia and the Territories.

Florida.— Governed by rules of the common law, except as to sale of Florida fed beef, or fresh meat of any edible animal within the State. Act approved June 11, 1897, prohibits trusts relating to sale of such beef and meats within the State. Laws 1897, chap. 4534.

Georgia.— Laws 1896, chap. 122. Penalties as to individuals include fine and imprisonment.

Idaho.— Constitution, art. 11, § 18, prohibits monopolies, and directs Legislature to pass laws to enforce the provision with appropriate penalties. No statute up to 1906.

Illinois.— Act of June 11, 1891; June 20, 1892, and June 20, 1893; Criminal Code, §§ 269a, 269t. Relieves purchaser in suit by the trust. Declared unconstitutional in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. See *ante*, page 124.

Indiana.— Act approved March 3, 1899. Laws 1899, chap. 148. Penalty may include imprisonment.

Indian Territory.— Governed by provisions of Sherman Act, approved July 2, 1890. Section 3 of the act extends its provisions to the Territories. See also act of Congress approved Feb. 18, 1901. Became a State with Oklahoma, June 14, 1906. May now make its own laws.

Iowa.— Act approved May 6, 1890, Code, §§ 5060, 5062. Penalty may include fine or imprisonment, or both.

Kansas.— Act of March 8, 1897; Act of 1899, and Laws 1901, chap. 145. Penalty under Act of 1897 is both fine and imprisonment. Under Act of 1899, penalty might be either. Re-

relieves purchaser in suit by the trust. Validity of act sustained in *Smiley v. Kansas*, 196 U. S., see *ante.* § 58.

Kentucky.— Constitution prohibits pooling by railroads. Section 201 prohibits trusts and monopolies, section 198. *Kentucky Statutes*, §§ 3915–3921. Penalty, fine or imprisonment, or both.

Louisiana.— Constitution prohibits trusts and monopolies, section 190. Prohibited by act approved July 7, 1892, Act 90. Punishment, fine or imprisonment, or both.

Maine.— *Laws* 1904, chap. 47, §§ 53 and 55.

Maryland.— Constitution declares “that monopolies are odious, contrary to the spirit of a free government, and the principles of commerce, and ought not to be suffered.” Declaration of Rights, section 41. No statute up to 1906.

Massachusetts.— Governed by the rules of the common law. No statute up to 1906.

Michigan.— Act approved June 23, 1899. *Laws*, chap. 255. Penalty, fine or imprisonment, or both.

Minnesota.— Acts approved April 20, 1891; April 8, 1893; *Laws* 1899, chap. 359; and April 10, 1901, chap. 194. Penalty, fine and imprisonment.

Mississippi.— *Laws* 1900, chap. 88, approved March 12, 1900. Penalty, fine or imprisonment, or both.

Missouri.— *Laws* 1891, chap. 143; *Rev. Stat.* 1899, §§ 8965–8977. Relieves purchaser in suit by the trust. See *ante.* § 59.

Montana.— Constitution, art. 15, § 20; Penal Code, chap. 8, §§ 321, 325.

Nebraska.— Elaborate statute, *Laws* 1897, chap. 79. Penalty, fine only. Relieves purchaser in suit by the trust.

Nevada.— Governed by the rules of the common law. No statute up to 1906.

New Hampshire.— Governed by the rules of the common law. No statute up to 1906.

New Jersey.— Governed by the rules of the common law. No statute up to 1906.

New Mexico.— Governed by provisions of Sherman Act, approved July 2, 1890. Section 3 of act extends its provisions to the Territories.

New York.—Laws 1899, chap. 690, prohibits monopolies in articles of common use and contracts in restraint of trade. See also Penal Code, § 168.

Laws 1899, chap. 727, prohibits pools, trusts, and conspiracies to control rates of transportation by foreign corporations and others doing business in the State.

North Carolina.—Laws 1899, chap. 666, ratified March 8, 1899. Penalty, forfeiture of \$100 per day.

North Dakota.—Revised Code of 1899, §§ 7480-7484. Violation of statute declared to be a misdemeanor.

Ohio.—Bates' Annotated Statutes, 1904, § 4427.

Oklahoma.—Governed by the Sherman Act and by the Oklahoma statute, Laws 1893, chap. 17, § 6140. Became a State with the Indian Territory, June 14, 1906. May now make its own laws.

Oregon.—Governed by the rules of the common law. No statute up to 1906.

Pennsylvania.—Governed by the rules of the common law. No statute up to 1906.

Rhode Island.—Governed by the rules of the common law. No statute up to 1906.

South Carolina.—Act approved Feb. 26, 1902, chap. 1902, §§ 2845, 2847. Punishment, fine and forfeiture.

South Dakota.—Revised Penal Code, 1903, §§ 770-781.

Tennessee.—Acts of March 10, 1890; March 30, 1891; April 30, 1897. Penalty under last act made fine and imprisonment, or both.

Texas.—Rev. Stat. of Texas, 1895, art. 5313-5321a; Laws 1903, chap. 94. Acts sustained *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

Utah.—Prohibited by Constitution, art. 12, § 20; also by Utah Rev. Stat., 1898, §§ 321 and 1758. Penalty, fine only.

Vermont.—Governed by the rules of the common law. No statute up to 1906.

Virginia.—Governed by the rules of the common law. No statute up to 1906.

Washington.— Prohibited by Constitution, art. 12, § 22, which declares that trusts and monopolies shall never be allowed in the State. No statute up to 1906.

West Virginia.— Governed by the rules of the common law. No statute up to 1906.

Wisconsin.— Laws 1893, chap. 219; Rev. Stat. 1898, §§ 1747, e. f. g. 1791. Liability of trust confined to damages to injured party and injunction to dissolve the trust.

Wyoming.— Constitution, art. 10, § 8, prohibits consolidations or combinations to prevent competition or control prices of products in any manner.

XI. TELEGRAPH COMPANIES.

§ 61. As to Right of Eminent Domain — Act of July 24, 1866.— Under the act of Congress, passed July 24, 1866 (U. S. Rev. Stat., § 5263 *et seq.*), whereby rights are conferred upon telegraph companies to construct and operate their lines through and along and over the public domain, military or postroads and navigable waters of the United States, no power is given to such telegraph companies to enter upon private property without the consent of the owner. Nor does the statute confer upon such telegraph companies the right of eminent domain. (*Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540.)

The right of way secured by a railroad company is property devoted to public use. It is a public highway, and, as such, is subject to State and Federal control, but such property is deemed to be private to the extent that it can only be taken from the railroad company by another public service corporation, by the exercise of the right of eminent domain. The statutes of the State of New Jersey under which the appellant claimed the right to enter upon the land embraced in the right of way of the respondent, the Pennsylvania Railroad Company, did not, in terms, confer the right of eminent domain upon the telegraph company. The right of eminent domain cannot be delegated, and the lessee of the corporation cannot exercise the power of condemnation conferred by the Legislature upon the lessor, nor does the Telegraph

Act of July 24, 1866 (U. S. Rev. Stat., § 5263 *et seq.*), confer the right of eminent domain upon telegraph companies. (*Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 594.)

XII. SAFETY APPLIANCE LAW.

§ 62. Safety Appliance Law — Automatic Couplers, Different Types — Liability of Carrier to Employee.—A railroad company is liable to a brakeman in its employ, who sustains injury by reason of the fact that defendant's cars were equipped with couplers which would not couple automatically by impact, pursuant to the provisions of the Safety Appliance Law of March 2, 1893.* Plaintiff was ordered to go between the engine and dining car to perform the service of coupling. Both cars were equipped respectively with the Janney coupler and the Miller hook, automatic couplers, but of different types. Because of the difference in pattern of the couplers they would not couple automatically by impact. The court held that the object of the statute was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man, in order to operate the couplers, to go between the ends of the car. The legislative intent was to promote the public welfare and to secure safety to employees and passengers. The risk of coupling and uncoupling was the evil sought to be remedied, and in this aspect the statute was remedial, while with respect to recovering penalties, the statute might be construed as penal. The design to give relief was more dominant than to inflict punishment. (*Johnson v. Southern Pacific Co.*, 196 U. S. 1.)

§ 63. Safety Appliance Law — Penalties — Liability of Carrier for Penalty.—A car loaded with coal in one State to be delivered to a consignee in another State, is "used in moving interstate traffic" within the meaning of the Safety Appliance Law (Act approved March 2, 1893, chap. 196),

* For text of the Act, see Snyder's Interstate Commerce Act, page —.

when taken by the carrier from the place of loading, although the carrier undertook to deliver it to a connecting carrier within the same State. The words of the statute, "any car," means all kinds of cars running on the rails, including locomotives. (*Johnson v. Southern Pacific Co.*, 196 U. S. 1.) A car not equipped with couplers which will not couple automatically by impact, is forbidden to be used by the statute, and the use of such car is unlawful. (District Court, southern district Illinois, March 2, 1905. *United States v. Southern Ry. Co.*, 135 Fed. Rep. 122.)

The court held further that the defense interposed should be treated as similar defenses involving the question of intent under the revenue laws, and of good faith under statutes against handling adulterated goods, which are not tenable in prosecutions to recover the statutory penalty. It appeared also that the alleged inspection shown by defendant was almost farcical, and that government inspectors found many defective appliances in a number of cars. Defendants held liable. (*United States v. Southern Ry. Co.*, 135 Fed. Rep. 122.)

The case cited was brought by the United States under section 6 of the Safety Appliance Law of March 2, 1893, to recover a penalty of \$100 imposed by the act for "each and every violation" of the provisions of the act. The defense interposed was that if the car had been originally equipped with the coupling device required by law, the carrier would not be liable for using a defective appliance if it had exercised reasonable care and diligence to discover and repair the defect before placing the car in service. The court held that while the act was penal in its nature and must be construed strictly, such construction must be given to it as will fairly carry out the legislative intent. (*Johnson v. Southern Pacific Co.*, 196 U. S. 1.)

CHAPTER THREE.

Legislation of 1906, Relating to Interstate Commerce Containing Text of

EMPLOYERS' LIABILITY BILL; PURE FOOD BILL; MEAT INSPECTION BILL, AND HALL-MARK OR JEWELERS' LIABILITY BILL.

In addition to the amendments to the Interstate Commerce Act, and to the Elkins Act, relating to carriers engaged in interstate commerce, the first session of the Fifty-ninth Congress enacted the Employers' Liability Bill, giving to the legal representatives of a deceased employee, in the service of a common carrier, a cause of action against the employer for damages for injuries resulting in the death of the employee, through the negligence of the carrier.

Other important legislation was enacted, concerning not only the great transportation companies operating the highways of the nation, but relating to general business carried on by individuals, firms, and corporations employing millions of capital in various enterprises, including the preparation and sale of food products, provisions, and dressed meats, drugs, medicines, and liquors, and in the manufacture and sale of jewelry and merchandise manufactured from gold and silver and their alloys. The legislation with regard to meats and provisions, drugs, and liquors affects the public health, and the object sought is to secure pure food. The legislation with regard to merchandise made with the precious metals was intended to make honesty compulsory as to the true value of the articles sold, and to compel their true

weight and fineness to be stamped or branded thereon. The warrant for these laws, it is claimed, is contained in the power conferred upon Congress, under the Constitution, to regulate commerce among the States and with foreign nations.

This legislation is embraced in four statutes as follows:

The Employers' Liability Bill, entitled "An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees." (Approved June 11, 1906.)

The Pure Food Bill, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." (Approved June 30, 1906.)

The Meat Inspection Bill, contained in the bill making appropriations for the Department of Agriculture, entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven." (Approved June 30, 1906.)

The Hall-Mark, or Jewelers' Liability Bill, entitled "An Act forbidding the importation, exportation, or carriage in interstate commerce of falsely or spuriously stamped articles of merchandise made of gold or silver or their alloys, and for other purposes." (Approved June 13, 1906.)

The public health is also safeguarded by the bill extending the powers of the national quarantine, entitled "An Act to further protect the public health, and make more effective the national quarantine." (Approved June 19, 1906.)

Employers' Liability Bill.—One feature of the Employers' Liability Bill is, that it creates a new rule of evidence with

regard to the contributory negligence of the deceased employee, in an action to recover damages by his legal representatives. The statute, section 2, declares that "the fact that the employee may have been guilty of contributory negligence was slight, and that of the employer was gross in comparison, but the damages shall be diminished by the proof in proportion to the amount of negligence attributable to such employee." The disposition of all damage suits, where negligence is shown on the part of the carrier, rests solely with the jury, and not with the court. The statute makes questions as to negligence, and degree of contributory negligence, questions of fact for the jury and not questions of law for the court. The statute provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. Employers' Liability Act—Contributory Negligence.—That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount

of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Sec. 3. Employers' Liability Act—Contracts with Carrier No Bar.—That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Sec. 4. Employers' Liability Act—Statute of Limitations.—That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

Sec. 5. Employers' Liability Act—Duty of Carrier under Safety Appliance Law Not Impaired.—That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

The Pure Food Bill.—The provisions of the Pure Food Bill relates to manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors. The text of the statute is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any

Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

Sec. 2. Pure Food Bill—Adulterated and Misbranded Articles Forbidden.—That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use

or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

Sec. 3. Pure Food Bill—Uniform Regulations.— That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Sec. 4. Pure Food Bill—Examination of Specimens.— That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by the publication in such manner as may be prescribed by the rules and regulations aforesaid.

Sec. 5. Pure Food Bill — Offenders How Punished.—

That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

Sec. 6. Pure Food Bill — Definitions.—That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

Sec. 7. Pure Food Bill — Adulteration Defined.—That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or

any vinous, malt or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Sec. 8. Pure Food Bill—Term Misbranded Defined.—That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded.

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other

contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in

this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

Sec. 9. Pure Food Bill — Defense Dealer May Impose.—

That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Sec. 10. Pure Food Bill — Venue of Proceedings in Rem.—

—That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or other-

wise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

Sec. 11. Pure Food Bill — Samples of Imports — Confiscation.—The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

Sec. 12. Pure Food Bill — Definitions — Construction of Act.— That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

Sec. 13. Pure Food Bill — When Act takes Effect.— That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved June 30, 1906.

Meat Inspection Bill.— As a supplement to the legislation embraced in the Pure Food Bill, and in order to secure the inspection of dressed meats and meat food products, in order to prevent the use in interstate commerce, of such articles which are unsound, unhealthful, unwholesome or otherwise unfit for human food, the Agricultural Appropriation Bill for the fiscal year ending June 30, 1907, approved June 30, 1906, contains the following provisions in the part of the bill relating to the Bureau of Animal Industry:

Secretary of Agriculture May Appoint Inspectors.— That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce; and all cattle, swine, sheep, and goats found on such inspection to show symptoms of disease shall be set apart and slaughtered

separately from all other cattle, sheep, swine, or goats, and when so slaughtered the carcasses of said cattle, sheep, swine, or goats shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary of Agriculture as herein provided for.

Duty of Inspectors.— That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed;" and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned," all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspec-

tion shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained.

Access to Establishments.— Marks, Tags, Stamps, and Labels.— That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: *Provided*, That, subject to the rules and regulations of the Secretary of Agriculture, the provisions hereof in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of this Act.

Label to be Attached.—That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "Inspected and passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

Experts in Sanitation — Packing Establishments.—The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "inspected and passed."

That the Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats,

and the food products thereof, slaughtered and prepared in the establishments hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime.

Uninspected Meat Foods Prohibited.— That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "inspected and passed," in accordance with the terms of this Act and with the rules and regulations prescribed by the Secretary of Agriculture: *Provided*, That all meat and meat food products on hand on October first, nineteen hundred and six, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce.

Forged or Counterfeit Labels Prohibited.— That no person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act, or any certificate in relation thereto, authorized or required by this Act or by the said rules and regulations of the Secretary of Agriculture.

Inspection of Animals and Carcasses for Export.— That the Secretary of Agriculture shall cause to be made a careful inspection of all cattle, sheep, swine, and goats intended and offered for export to foreign countries at such times and

places, and in such manner as he may deem proper, to ascertain whether such cattle, sheep, swine, and goats are free from disease.

And for this purpose he may appoint inspectors who shall be authorized to give an official certificate clearly stating the condition in which such cattle, sheep, swine, and goats are found.

And no clearance shall be given to any vessel having on board cattle, sheep, swine, or goats for export to a foreign country until the owner or shipper of such cattle, sheep, swine, or goats has a certificate from the inspector herein authorized to be appointed, stating that the said cattle, sheep, swine, or goats are sound and healthy, or unless the Secretary of Agriculture shall have waived the requirement of such certificate for export to the particular country to which such cattle, sheep, swine, or goats are to be exported.

That the Secretary of Agriculture shall also cause to be made a careful inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended and offered for export to any foreign country, at such times and places and in such manner as he may deem proper.

And for this purpose he may appoint inspectors who shall be authorized to give an official certificate stating the condition in which said cattle, sheep, swine, or goats, and the meat thereof, are found.

And no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, mutton, pork, or goat meat, being the meat of animals killed after the passage of this Act, or except as hereinbefore provided for export to and sale in a foreign country from any port in the United States, until the owner or shipper thereof shall obtain from an inspector appointed under the provisions of this Act a certificate that the said cattle, sheep, swine, and goats were sound and healthy at the time of inspection, and that their meat is sound and wholesome, unless the Secretary of Agriculture shall have waived the requirements of such certificate for the country to which said cattle, sheep, swine, and goats or meats are to be exported.

Certificates of Inspection for Shipper.—That the inspectors provided for herein shall be authorized to give official certificates of the sound and wholesome condition of the cattle, sheep, swine, and goats, their carcasses and products as herein described, and one copy of every certificate

granted under the provisions of this Act shall be filed in the Department of Agriculture, another copy shall be delivered to the owner or shipper, and when the cattle, sheep, swine, and goats or their carcasses and products are sent abroad, a third copy shall be delivered to the chief officer of the vessel on which the shipment shall be made.

Compliance With Law Compulsory — Penalties.— That no person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory or in the District of Columbia or any place under the jurisdiction of the United States, other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, operated by said firm, person, or corporation is located unless and until said person, firm, or corporation shall have complied with all of the provisions of this Act.

That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period not more than two years, or by both such fine and imprisonment, in the discretion of the court.

When Label Shall Be Refused.— That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be sound, healthful, wholesome, and fit for human food, and to contain no dyes, chemicals, preservatives, or ingredients which render such meat food product unsound, unhealthful, unwholesome, or unfit for human food; and to have been prepared under proper sanitary conditions, hereinbefore pro-

vided for; and shall perform such other duties as are provided by this Act and by the rules and regulations to be prescribed by said Secretary of Agriculture; and said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act.

Bribery of Inspector a Felony.—That any person, firm, or corporation, or any agent or employee of any person, firm, or corporation who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this Act or by the rules and regulations of the Secretary of Agriculture any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty herein provided for, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not less than five thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this Act who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in interstate or foreign commerce any gift, money, or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than one thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years.

Animals Slaughtered by Farmer on Farm.—That the provisions of this Act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products,

supplying their customers: *Provided*, That if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment for a period of not exceeding one year, or by both such fine and imprisonment: *Provided also*, That the Secretary of Agriculture is authorized to maintain the inspection in this Act provided for at any slaughtering, meat canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of this Act shall apply notwithstanding this exception.

Permanent Appropriation \$3,000,000.— That there is permanently appropriated, out of any money in the Treasury not otherwise appropriated, the sum of three million dollars, for the expenses of the inspection of cattle, sheep, swine, and goats and the meat and meat food products thereof which enter into interstate or foreign commerce and for all expenses necessary to carry into effect the provisions of this Act relating to meat inspection, including rent and the employment of labor in Washington and elsewhere, for each year. And the Secretary of Agriculture shall, in his annual estimates made to Congress, submit a statement in detail, showing the number of persons employed in such inspections and the salary or per diem paid to each, together with the contingent expenses of such inspectors and where they have been and are employed.

Total, Bureau of Animal Industry, three million nine hundred and forty-six thousand nine hundred and eighty dollars.

Approved June 30, 1906.

Hall-Mark, or Jewelers' Liability Bill.—The sale of falsely or spuriously stamped merchandise, made of gold and silver or their alloys is forbidden and prohibited, on and after June 14, 1907, by the provisions of an act approved June 13, 1906, and the importation, exportation, or carriage in

interstate commerce of such spuriously stamped merchandise is punishable as a misdemeanor, by fine or imprisonment, or by both fine and imprisonment. The text of the statute is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person, firm, corporation, or association, being a manufacturer of or wholesale or retail dealer in gold or silver jewelry or gold ware, silver goods or silverware, or for any officer, manager, director, or agent of such firm, corporation, or association to import or export or cause to be imported into or exported from the United States for the purpose of selling or disposing of the same, or to deposit or cause to be deposited in the United States mails for transmission thereby, or to deliver or cause to be delivered to any common carrier for transportation from one State, Territory, or possession of the United States, or the District of Columbia, to any other State, Territory, or possession of the United States, or to said District, in interstate commerce, or to transport or cause to be transported from one State, Territory, or possession of the United States, or from the District of Columbia, to any other State, Territory, or possession of the United States, or to said District, in interstate commerce, any article of merchandise manufactured after the date when this Act takes effect and made in whole or in part of gold or silver, or any alloy of either of said metals, and having stamped, branded, engraved, or printed thereon, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which said article is incased or inclosed, any mark or word indicating or designed or intended to indicate that the gold or silver or alloy of either of said metals in such article is of a greater degree of fineness than the actual fineness or quality of such gold, silver, or alloy, according to the standards and subject to the qualifications set forth in sections two and three of this Act.

Sec. 2. Jewelers' Liability Bill — Gold — Standard of Weight and Fineness.— That in the case of articles of merchandise made in whole or in part of gold or of any of its alloys so imported into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered for transportation to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, the actual fineness of such

gold or alloy shall not be less by more than one-half of one carat than the fineness indicated by the mark stamped, branded, engraved, or printed upon any part of such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed; except that in the case of watch cases and flat ware, so made of gold or of any of its alloys, the actual fineness of such gold or alloy shall not be less by more than three one-thousandth parts than the fineness indicated by the mark stamped, branded, engraved, or printed upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed: *Provided*, That in any test for the ascertainment of the fineness of any article mentioned in this section, according to the foregoing standards, the part of the article taken for the test, analysis, or assay shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of said article: *Provided, further*, That in the case of any article mentioned in this section, in addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold or of its alloys contained in such article, including all solder and alloy of inferior fineness used for brazing or uniting the parts of such article (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one carat than the fineness indicated by the mark stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed, it being intended that the standards of fineness and the tests or methods for ascertaining the same provided in this section for articles mentioned therein shall be concurrent and not alternative.

Sec. 3. Jewelers' Liability Bill—Silver—Standard of Weight and Fineness.—That in case of articles of merchandise made in whole or in part of silver or any of its alloys so imported into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered for transportation to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, the actual fineness of the silver or alloy thereof of which such article is wholly or partly composed shall not be less by more than four one-thousandth parts than the actual fineness indicated by any

mark (other than the word "sterling" or the word "coin") stamped, branded, engraved, or printed upon any part of such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed; and that no such article or tag, card, or label attached thereto, or box, package, cover, or wrapper in which such article is incased or inclosed shall be marked, stamped, branded, engraved, or printed with the word "sterling" or "sterling silver" or any colorable imitation thereof, unless such article or parts thereof purporting to be silver contains nine hundred and twenty-five one-thousandth parts pure silver; that no such article, tag, card, label, box, package, cover, or wrapper shall be marked, stamped, branded, engraved, or printed with the words "coin" or "coin silver" or colorable imitation thereof unless such articles or parts thereof purporting to be silver contains nine hundred one-thousandth parts pure silver: *Provided*, That in the case of all such articles whose fineness is indicated by the word "sterling" or the word "coin" there shall be allowed a divergence in the fineness of four one-thousandth parts from the foregoing standards: *Provided*, That in any test for the ascertainment of the fineness of any such article mentioned in this section according to the foregoing standards the part of the article taken for the test, analysis, or assay shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of such article: *Provided further*, That in the case of any article mentioned in this section, in addition to the foregoing tests and standards, the actual fineness of the entire quantity of silver or of its alloys contained in such article, including all solder and alloy of inferior fineness used for brazing or uniting the parts of such article (all such silver, alloys, and solder being assayed as one piece), shall not be less by more than ten one-thousandth parts than the fineness indicated by the marked, stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed, it being intended that the standards of fineness and the tests or methods for ascertaining the same provided in this section for articles mentioned therein shall be concurrent and not alternative.

Sec. 4. Jewelers' Liability Bill — Articles Plated With Gold or Silver.— That in the case of articles of merchandise

made in whole or in part of an inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plating, covering, or sheet composed of gold or silver, or of an alloy of either of said metals, and known in the market as rolled gold plate, gold plate, gold filled, silver plate, or gold or silver electroplate, or by any similar designation, so imported into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, no such article, nor any tag, card, or label attached thereto, nor any box, package, cover, or wrapper in which such article is incased or inclosed, shall be stamped, branded, engraved, or imprinted with any word or mark usually employed to indicate the fineness of gold, unless such word or mark be accompanied by other words plainly indicating that such article or part thereof is made of rolled gold plate, gold plate, or gold electroplate, or is gold filled, as the case may be, and no such article, nor any tag, card, or label attached thereto, nor any box, package, cover, or wrapper in which such article is incased or inclosed, shall be stamped, branded, engraved, or imprinted with the word "sterling" or the word "coin," either alone or in conjunction with other words or marks.

Sec. 5 Jewelers' Liability Bill — Penalty for Violation.
—That each and every person, firm, corporation, or association, being a manufacturer of or a wholesale or retail dealer in gold or silver jewelry, gold ware, silver goods, or silverware, who or which shall knowingly violate any of the provisions of this Act, and every officer, manager, director, or managing agent of any such corporation or association having knowledge of such violation and directly participating in such violation or consenting thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which has been conducted the transportation of the article in respect to which such violation has been committed, shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than three months, or both, at the discretion of the court. Whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Sec. 6. Jewelers' Liability Bill — "Article of Merchandise Defined."— That the expression "article of merchandise" as used in this Act shall signify any goods, wares, works of art, commodity, or other thing which may be lawfully kept or offered for sale.

Sec. 7. Jewelers' Liability Bill — When State Law Applies.— That all articles of merchandise to which this Act applies which shall have been transported into any State, Territory, District, or possession of the United States, and shall remain therein for use, sale, or storage, shall, upon arrival in such State, Territory, District, or possession, be subject to the operation of all the laws of such State, Territory, District, or possession of the United States to the same extent and in the same manner as though such articles of merchandise had been produced in such State, Territory, District, or possession, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Sec. 8. Jewelers' Liability Bill — When Act Takes Effect. That this Act shall take effect one year after the date of its passage.

Approved, June 13, 1906.

1. The first part of the document is a list of names and addresses of the members of the committee.

INDEX.

[Supplement to Snyder's Interstate, etc.]

	PAGE.
Action, by attorney-general to recover rebates	13
pending in State court, when no bar under Sherman Act, § 41.	100
when Anti-Trust Law may be pleaded as defense to, § 59.	123
as to assignment of cause of, § 40c	97, 98
Acceptance of concurrence in joint rates required	9
Access to packing-houses at all times	146
Accidents, and causes thereof must be given	31
Accounts, carrier must have one set of	33
commission to have access to	32
of common carrier must be uniform	32
penalty for failure to keep	32, 33
Acts of Congress cited and referred to:	
1789, Sept. 24. Judiciary Act (Jurisdiction), § 9, as amended.	82
1875, March 3. Judiciary Act (as to Removal of Causes)....	81
1886, June 29. Trades Unions Act (Carriers)	113
1887, Feb. 4. Interstate Commerce Act, as amended June 29, 1906	1-37
1888, Aug. 13. Judiciary Act (as to Removal of Causes)... ..	81
1888, Aug. 13. Judiciary Act (as to Assigned Claims).....	98
1890, July 2. Sherman Act (as to Trusts)	85
1890, Aug. 8. Wilson Act (Liquors), §§ 3, 4.....	42, 43
1893, Feb. 11. Relating to Testimony	46
1893, Feb. 13. Harter Act (Carriers by Water).....	xvi, xvii
1894, Aug. 27. Wilson Bill (Income Tax)	124
1898, June 1. Carriers' Employers Arbitration Act	113
1901, March 3. Requiring Reports of Accidents	32
1903, Feb. 11. Expediting Act	27-85
1903, Feb. 14. Commerce and Labor Act	46
1903, Feb. 19. Elkins Act, § 1, as amended, June 29, 1906..	10
	46, 85
1903, Feb. 25. Appropriation Bill for 1904 (Relating to Evi- dence)	46
1906, June 11. Employers' Liability Bill	134
1906, June 13. Hall-Mark, or Jewelers' Liability Bill	134

Acts of Congress—(Continued):	PAGE.
1906, June 19. Quarantine Bill	134
1906, June 28. Anti-Immunity Act	46
1906, June 29. Rate Bill (amending Interstate Commerce Act)	1-37
1906, June 30. Meat Inspection Bill	134
1906, June 30. Pure Food Bill	136-144
U. S. Rev. Stat., § 629	98
U. S. Rev. Stat., § 711	82, 83
U. S. Rev. Stat., § 720	114
U. S. Rev. Stat., § 721	116, 117
U. S. Rev. Stat., § 5440	71
Admiralty, proceedings under Pure Food Bill to conform to	143
Adulteration, of food, etc., forbidden	137
of food, how punished	139
Agents, and examiners may be appointed by Commission	32
of carrier, when liable to imprisonment	10, 11
principal liable for acts of	144
Agreements, must be filed by carrier with Commission	9
Agriculture, secretary of, to make rules	138
secretary of, may appoint meat inspectors	144, 145
Alabama, anti-trust laws of, § 60	126
Alaska, governed by provisions of Sherman Act, § 60	120
Alternative Remedy, when shipper must elect	14
Animals, may be inspected and condemned	145
to be imported and exported	148, 149
Annual Reports of carrier must be uniform	30-33
of Interstate Commerce Commission, how made	35
See also REPORTS; CARRIER.	
Anti-Trust Laws of the several states, § 55	115
Appeal from order directly to Supreme Court	26, 27
from order of Commission to have priority	26, 27
from interlocutory decree, continuing injunction only to Supreme Court	28
directly to the Supreme Court, § 32	85
Appraisal of railroad property, power as to	xxix
Appropriation for enforcement of Meat Inspection Bill	152
Arizona, governed by provisions of the Sherman Act, § 60	126
Arkansas, Anti-Trust Laws of, § 60	126
Assignment of claims, jurisdiction of Federal courts, § 40c	97
Attorney Fee, may be recovered against carrier	14

	PAGE.
Attorney-General directed to prosecute crime of rebating	13
must direct District Attorney to prosecute forfeitures.....	25, 26
may apply for mandamus, when	33, 34
Beef Trust, an unlawful conspiracy under Sherman Act, § 46.....	103
Bill of Lading, made compulsory	34
now compulsory	xiv
not to contain exemption clauses	xiv
under Harter Act	xyi
Blacklist, prohibited under Sherman Act, § 52	108
of employees by carrier, when prohibited, § 54a	113
Blackstone, Sir William, on power of visitation.....	xxv
Blends, to be indicated by label.....	141
Books, production of, compulsory	18
of common carrier must be uniform	32
false entries in, a misdemeanor	33
of carrier must be uniform	xxvii
Book Trust, when void under Sherman Act, § 52	108
owning copyright, when cannot control sale, § 53	110
Boycott, conspiracy to, restrained by injunction, § 54	111
Breaking Bulk, when prohibited by carrier	13
Bribery, of meat inspector, a felony	151
Burden of Proof, findings of Commission, <i>prima facie</i> evidence, § 40.	94
in suit against Drug Trust, § 40a	95
Butchers, retail butchers subject to inspection	152
California, anti-trust laws of, § 60	126
Carrier, forbidden to be dealer, must furnish switches and terminal facilities	5, 6
See also COMMON CARRIER; RAILROAD.	
Carriers by Water, when not within Commerce Act	xv
Cars, common carrier must furnish	5
shipper may compel carrier to furnish, by mandamus	36
for interstate commerce, State cannot control, § 5.....	44
percentage of, may be fixed by mandamus, § 27	78
Carcasses, may be destroyed	145
to be inspected	149
Cattle, to be inspected	145
Certificate, duty of inspector as to.....	149
of inspection for shipper	149, 150
Change of rates, must be on notice.....	8, 9

	PAGE.
Charges, all charges must be reasonable.....	3
greater, for longer than shorter haul forbidden.....	6, 7
for icing and storage included in term transportation.....	3
Chesapeake and Ohio Case, importance of.....	xxxi
Claims for damages to be filed with Commission within two years..	24
jurisdiction of Federal courts as to assigned, § 40c.....	97
Coal Properties, controlled by carriers.....	xxii, xxiii
Coastwise Steamship, when not within Commerce Act.....	xv
Colorado, common-law rule as to trust in, § 60.....	127
Combinations in Pooling, by carrier, unlawful.....	7
Commerce and Labor, secretary of, to make rules.....	138
Common Carrier, defined under Interstate Commerce Act.....	1, 2
when pipe line companies are	1, 2
express companies are	2
sleeping car companies are	2
forbidden to deal in commodities	2
must furnish switches and terminal facilities.....	5, 6
duty of, as to connecting lines.....	6
forbidden to discriminate or give rebates.....	6
cannot carry unless rates are filed by.....	10
cannot extend privileges not specified in tariffs.....	10
when liable for acts of agents and employees.....	12
forbidden to prevent continuous carriage.....	13
when liable in damages	14
criminal liability of	14-17
order for reparation against	20
Commission may regulate transportation of	21, 22
failure of, to agree among themselves.....	22
rates for connecting line of.....	22
must pay for services and instrumentalities.....	23
must comply with order of Commission	25
may review order of Commission	26, 27
annual reports of, public records.....	28
when not excused from complying with order.....	29
must make uniform reports.....	30-33
must keep uniform books	30-33
books and accounts of, may be examined.....	32
first receiving property, liable.....	34
must issue bill of lading	34
may collect full fare from government troops, § 17.....	62
forbidden to deal in commodities, § 20.....	63
by acceptance of charter, assumes public trust, § 40d.....	100
cannot contract to give exclusive privileges, § 40d.....	100

Common Carrier —(Continued):	PAGE.
forbidden to blacklist employees, § 54a.....	113
when liable to employee under Safety Appliance Law, § 62....	131
when liable for penalty under Safety Appliance Law, § 63.....	131
liability of, to employees for damages.....	135
community of interest among	xii
result of acting as dealer.....	ix, xx
coal properties controlled by.....	xxii, xxiii
power of visitation as to	xxv
Common Law, Federal court cannot punish trust under, § 56.....	115
when may be administered in Federal courts, § 56.....	116 <i>et seq.</i>
as to trust and conspiracies in restraint of trade, § 57.....	118
Community of Interest among carriers	xii
Commutation Tickets, when carrier may issue.....	35, 36
Complaint to Commission, how made	20
Compounds to be indicated by label	141
Concessions, granting of, punishable by imprisonment.....	11
misdemeanor, under Elkins Act, § 23.....	73
Confiscation, under Pure Food Bill	142, 143
Connecticut, common-law rule as to trust in, § 60.....	127
Connecting Carriers, Commission may fix joint rates for	22
Consignee may receive goods pending examination.....	143
Conspiracy against United States, how punished, § 22.....	69
to boycott, when restrained by injunction, § 54.....	111
Constitutionality of immunity statute, §§ 8-11.....	45-49
Contempt, when Examiner may be punished for	33
Continuous Carriage, unlawful for carrier to prevent.....	13
Contracts must be filed by carrier with Commission	9
carrier must report all	31
when overlapping contracts illegal, § 24.....	75
when, will not effect right to mandamus, § 28.....	79
for sale of steamboats when not within Sherman Act, § 48....	105
not to sell goods outside of State when not within Sherman Act, § 50	107
illegal under Sherman Act, not enforceable, § 51.....	109
with carrier when no bar to action for damages.....	136
Copies of contracts and agreements must be filed.....	9
of reports to be furnished	21
of contracts and schedules public records.....	28
Copyright, when book trust not protected by, § 52.....	108
Corporation liable for acts of agents, receivers, and trustees....	10, 11
immunity does not extend to, § 12.....	52

	PAGE.
Cost of meat inspection to be paid by the government.....	152
Counterfeit labels prohibited	148
Court may fix amount of attorney's fee.....	14
may suspend or modify order of Commission	22
may enforce order of Commission for money damages.....	23, 24
authorized to issue injunction	26
appeal from, direct to Supreme Court.....	26, 27
exclusive jurisdiction of Federal, § 29	82, 83
Criminal Liability of carrier under Commerce Act.....	14-16
under Commerce Act and Elkins Act, §§ 22-24.....	69-76
Cumulative Remedy, shipper entitled to.....	35
Customs Duties on foreign shipments.....	8
Damages, when common carrier is liable for.....	14
complaint not to be dismissed for absence of direct damage....	20
order for, how enforced.....	23, 24
order of Commission for, enforced in Federal court.....	23, 24
initial carrier liable for	34
orders for payment of, § 36.....	89
order for, how enforced, § 37.....	92
under Sherman Act, may be recovered by municipal corpora- tion, § 42	101
measure of, under Sherman Act, § 43.....	101
Dealer, carrier forbidden to be, § 20.....	63
legislation of 1906 as to, § 21.....	68
Decision, after rehearing	29
See also ORDER.	
Decree cannot be suspended without notice.....	27, 28
See also ORDER.	
Defenses under Pure Food Bill	142
Definitions, interstate commerce defined.....	1, 2
common carriers defined	1, 2
term "railroad"	2
term "transportation"	3
term "rebates"	6
"carrier" means common carrier	10
distinction between orders "lawfully" made, and "regularly" made, § 36	92
term "drug"	139
term "food"	139
adulteration as to drugs defined.....	139
adulteration of confectionery defined	139
adulteration of food defined	140

INDEX.

165

Definitions —(Continued):	PAGE.
term "misbranded" defined	140
term "territory" under Pure Food Bill.....	144
term "person" under Pure Food Bill.....	144
articles of merchandise defined.....	157
Delaware, common-law rule as to trust in, § 60.....	127
Deposition, testimony by, how taken.....	19
of foreign witness to be filed.....	20
Discrimination in furnishing cars forbidden.....	5
in moving traffic forbidden	5
unjust discrimination defined	6
granting of, punishable by imprisonment.....	11
when refusal to designate route is not, § 17.....	59
as to transportation of troops, § 19.....	62
District Attorney, authority to prosecute	18
must recover forfeitures	25
District of Columbia governed by provisions of Sherman Act, § 60..	127
Documentary evidence under Commerce Act, § 34.....	87
See also EVIDENCE.	
Drug Trust, burden of proof in suit against, § 40a.....	95
Duties, fee, customs duties.....	8
Earnings, Commission may require monthly reports of.....	32
Election of Remedies, when shipper must make.....	14
Elkins Act (February 19, 1903), text of section 1, as amended June	
29, 1906	10-13
violations of, where prosecuted	12
Eminent Domain, when telegraph companies may exercise, § 61....	130
Employees, when blacklist of, forbidden, § 54a.....	113
when, may recover against carrier under Safety Appliance	
Law, § 62	131
Employers Liability Bill, text of	134-136
Equity, orders in equity, how enforced, § 38.....	93
Evidence of concurrence in joint rates required.....	9
documentary, production of compulsory.....	18
reports and findings of Commission shall be	20
findings of Commission are <i>prima facie</i>	23, 24
certified copies of reports	28
schedules filed are <i>prima facie</i>	28
documentary, under Commerce Act, § 34	87
burden of proof, findings of Commission, § 35	94
Examiners, Commission may appoint	32
when punished for divulging facts	33

	PAGE.
Exclusive Jurisdiction of Federal courts defined, § 29.....	82, 83
See also JURISDICTION.	
Expediting Act (February 11, 1903), applicable to suits under	
Commerce Act	27
Expenses of Commission, how paid	30
of carrier must be furnished	31
Commission may require monthly report of	32
Experts in sanitation to be appointed.....	147
Export, animals for, to be inspected.....	148, 149
Facilities of Shipment included in term transportation.....	3
False Bills made criminal	15
False Classification made criminal	15
False Weights made criminal	15
Fares, schedule of, must be filed, printed, and posted	7
carrier forbidden to refund.....	10
Farmer, when, may slaughter animals on farm.....	151
Federal Control, tendency toward	iii, iv
Federal Courts cannot punish common-law trusts, § 56.....	115
when, may administer common law, § 56.....	116
Fees of foreign witness	20
Felony, penalty for bribing meat inspector.....	151
Fifth Amendment as to immunity defined, § 12.....	52
Findings of Commission shall be evidence.....	20, 21
Fine for failure to publish rates.....	11
for failure to keep books	32, 33
for divulging facts	33
Five Thousand Mile Tickets, carrier may issue.....	35, 36
Florida, Anti-Trust Laws of, § 60.....	127
Food, adulteration of, forbidden	137
misbrand of, forbidden	137
examination of specimens of	138
adulteration of, how punished	139
all meat foods to be inspected	148
Foreign Countries, rates to, must be printed and posted.....	3
animals exported to, to be inspected	148, 149
See also INSPECTION.	
Foreign Shipments, criminal liability as to, § 23.....	73
Forfeiture of carrier for failure to obey order.....	25
shall be payable to Treasurer of United States.....	25

Forfeiture —(Continued):	PAGE.
for failure to file reports or answer questions.....	31
of carrier for failure to keep accounts.....	32, 33
Forms for schedules prescribed by Commission	9
of accounts and records to be uniform.....	32
Fourth Amendment, as to immunity, defined, § 13.....	53
Fourteenth Amendment construed as to immunity, §§ 9, 10.....	48
Free Transportation, when forbidden	3, 4, 35
who entitled to	3, 4, 35
penalty for giving	3, 4, 36
effect of amendment as to.....	xii, xiii
Freight Classification involves power to fix rates, § 18.....	61
Freight Depots included in term railroad.....	3, 4
Gas Companies or pipe line companies not carriers within Commerce	
Act	1, 2
Georgia, Anti-Trust Laws of, § 60.....	127
Goats to be inspected	145
Gold, standard of articles manufactured from.....	153
Good Will, when sale of, not within Sherman Act, § 49.....	106
Grand Jury, examination before, § 10.....	49
Hall-Mark Bill, text of	152-157
Hall Marks, early statutes as to	xl
Harlan, Hon. John M., opinion of, as to conspiracy to boycott, § 54. 112	
Harter Act, provisions of, as to ship owners.....	xvi, xvii
Icing, refrigeration and storage included in term transportation....	3
Idaho, trusts prohibited by Constitution of, § 60.....	127
Illinois, Anti-Trust Laws of, § 60.....	127
Imitations to be indicated by label	141
Immunity defined, § 7	45
statute defining, § 7	45
under federal statute, § 8.....	47
under State statutes, § 9.....	48
does not extend to corporation, § 12.....	52
from search and seizure extends to corporation, § 13.....	53
Imprisonment, granting or soliciting rebate, punishable by.....	11
for crimes and conspiracies, § 22.....	69
for violation of Meat Inspection Bill.....	150
for violation of Pure Food Bill	137
for bribery under Meat Inspection Bill	151
penalty under Jeweler's Liability Bill	156
penalty of, only partly restored.....	xviii

	PAGE
Improvements, character and cost of, must be furnished	31
Indiana, Anti-Trust Laws of, § 60.....	127
Indian Territory, Anti-Trust Laws of, § 60.....	127
Indictment for conspiracy against the United States, § 22.....	71
Initial Carrier, when may prescribe route, § 16.....	57
See also CARRIER.	
Injunction, application for, on petition.....	26
when orders of Commission enforced by	26
order continuing appeal from	28
must be taken within thirty days	28
may be invoked to restrain boycott, § 54.....	111
when Federal court cannot enjoin State court, § 54b.....	114
Inspection of animals and carcasses for export.....	148, 149
cost of, to be paid by government.....	152
Inspectors of meats, how appointed.....	144, 145
duty of	145
to have access to packing houses	146
certificates of, to vessels	149
Interstate Commerce, as to original package, § 1.....	39
when State Liquor Laws not operative as to, § 2.....	40
when sale of liquors is not, § 3.....	42
State cannot compel furnishing cars for, § 5.....	44
Taxation of business within State, § 6.....	45
carriers engaged in, forbidden to blacklist employees, § 54a....	113
Interstate Commerce Act (as amended June 29, 1906), text of	
section 1	1-6
text of section 2	6
text of section 3	6
text of section 4	6, 7
text of section 5	7
text of section 6	7-10
text of section 7	13
text of section 8	14
text of section 9	14
text of section 10	14-17
text of section 11	17
text of section 12	18-20
text of section 13	20
text of section 14	20, 21
text of section 15	21-23
text of section 16	23-28
text of section 16a	28, 29
text of section 17	29

Interstate Commerce Act—(Continued):	PAGE.
text of section 18	29
text of section 19	30
text of section 20	30-34
text of section 21	35
text of section 22	35, 36
text of section 23	36, 37
text of section 24	37
Interstate Commerce Act, summary of amendments to	xi-xv
Interstate Commerce Commission may order switches, sidings, and	
terminal facilities	5, 6
power of, as to long and short haul regulations	6, 7
may notify requirements as to publishing rates	9
created under section 11	17
enlarged under section 24	37
how appointed	17
term of office	17
how removed	17
may prosecute through United States District Attorney	18
proceedings before, how conducted	20
may order reparation	20
may print reports for distribution	21
has power to fix rates	21, 22
may establish through joint rates	22
may make order regarding rates	22
may suspend or modify order	22
may fix charges for services and instrumentalities	23
may employ special counsel with consent of Attorney-General	26
orders of, how reviewed	26, 27
may order rehearing	28, 29
procedure before, how conducted	29
salary of	29, 30-37
sessions of, where held	30
may require uniform reports	30-33
to have access to all accounts and records	32
may employ special agents and examiners	32
may apply for mandamus	33, 34
annual reports of, how made	35
orders of, under legislation of 1906, § 35	87
orders of "lawfully" made and "regularly" made, §§ 36-39. 92-94	
Investigations by Commission, how conducted	20
Iowa, Anti-Trust Laws of, § 60	127
Jewelers, liability of, for false hall-marks	153
Joint Rates, schedule of, to be filed, printed and posted	7, 8
provision as to	9

Joint Rates —(Continued):	PAGE.
order of Commission fixing	22
when not pooling, § 16	55
Joint Tariffs must be filed with Commission	36
Jurisdiction, offense begun in one jurisdiction and completed in an-	
other	12
of federal courts as to mandamus, § 26.....	77
of federal courts defined, § 29.....	81
exclusive jurisdiction of federal courts defined, § 29.....	82
of federal courts in case of assigned claims, § 40c.....	97
of federal courts under Sherman Act not concurrent, § 41....	100
Kansas, Anti-Trust Laws sustained, § 58.....	121
provisions of Anti-Trust Act of, § 58.....	122
Anti-Trust Laws of, § 60.....	127
Kentucky, Anti-Trust Laws of, § 60.....	128
Labels, term inspected and passed	145-147
term inspected and condemned	145-147
to be attached to meat food products	147
when refused	147-150
forged or counterfeit labels prohibited	148
Lessee, criminal liability of	14, 15
Liability of individual members of a trust, § 44.....	102
of carrier under Safety Appliance Law, § 62.....	131
of carrier to employees for damages.....	134, 135
Libel, what to contain under Pure Food Bill.....	141
may be filed under Pure Food Bill.....	142
article falsely labeled to be destroyed	143
provision for marks, tags, and stamps.....	146
Limitation, for rebates, six years	13
Liquors, when State laws applicable to sale of, § 2.....	40
when sale of, not interstate commerce, § 3.....	42
Louisiana, Anti-Trust Laws of, § 60.....	128
Maine, Anti-Trust Laws of, § 60.....	128
Mandamus, court may issue writs of.....	26
on application of Commission or Attorney-General	33, 34
may issue, to enforce provisions of Act	34
remedy to furnish cars and move traffic.....	36, 37
declared to be a cumulative remedy.....	37
1906 legislation as to, § 25.....	76
jurisdiction of Federal courts as to, § 26.....	77
writ of, may fix percentage of cars, § 27.....	78
right to, when not effected by contract, § 28.....	70
Maryland, Constitution of, prohibits trust, § 60.....	128

INDEX.

171

	PAGE.
Massachusetts governed by common law as to trusts, § 60.....	128
Maximum Rate, Commission may fix	21, 22
See also JOINT RATES; RATES.	
Meats, inspectors of, how appointed	144, 145
uninspected meats prohibited	148
Meat Inspection Bill, text of	144-152
Michigan, Anti-Trust Laws of, § 60.....	128
Mileage Tickets, when carrier may issue.....	35
Minnesota, Anti-Trust Laws of, § 60.....	128
Misbranded, defined as to drugs.....	140
defined as to food	141
Misbranding of food, etc., forbidden.....	137
Misdemeanor, violation of Elkins Act is.....	10, 11
false entries or mutilation of books is.....	33
Mississippi, Anti-Trust Laws of, § 60.....	128
Missouri, Anti-Trust Laws of, when unconstitutional, § 59.....	123
Anti-Trust Laws of, § 60.....	128
Money, order for payment of, how enforced	23, 24
orders for payment of, § 36.....	80
Montana, Anti-Trust Laws of, § 60.....	128
Monthly Reports may be ordered by Commission	32
See also REPORTS.	
Municipal Corporation may recover damages under Sherman Act, § 42	101
Name of parties to print rates must be specified.....	9
Nebraska, Anti-Trust Laws of, § 60.....	128
Negligence, liability of carrier to employee for.....	135
contributory, question for jury	135, 136
when contract with carrier no bar to suit for	136
Nevada governed by common law, as to trusts, § 60	128
New Hampshire governed by common law as to trusts, § 60.....	128
New Jersey governed by common law as to trusts, § 60.....	128
New Mexico governed by provisions of the Sherman Act, § 60.....	128
New York, Anti-Trust Laws of, § 60.....	129
North Carolina, Anti-Trust Laws of, § 60.....	129
North Dakota, Anti-Trust Laws of, § 60.....	129
Notary Public, deposition may be taken before.....	19
when may take oath of carrier to reports.....	32

	PAGE.
Notice as to change of rates	8, 9
Oath to reports of carrier, how taken.....	32
Obedience to order, how enforced	26
See also INJUNCTION.	
Office of Commission, term of	37
Ohio, Anti-Trust Laws of, § 60.....	129
Oil Refiners, when governed by Interstate Commerce Act.....	1
Oklahoma, Anti-Trust Laws of, § 60.....	129
Order, supplemental order, joint rates.....	22
of Commission fixing rates	22
when to take effect	22
for damages, how enforced	23
of Commission, how served	25
may be modified or suspended	25
failure of carrier to obey penalty and forfeiture.....	25
when "regular," how enforced	26
of Commission, when enforced by injunction	26
venue of suits to set aside	27
cannot be suspended except on notice	27, 28
application for rehearing of	28, 29
of Interstate Commerce Commission, legislation as to, § 35....	87
"lawfully" made and "regularly" made distinguished, § 36..	92
for damages, how enforced, § 37.....	92
in equity, how enforced, § 38.....	93
lawfulness of, how reviewed, § 39.....	94
Oregon, governed by common law as to trusts, § 60	129
Original Package, what constitutes, § 1.....	39
Overlapping Contracts, when criminal, § 24.....	75
See also CONTRACTS..	
Packing Houses, inspectors to have access to.....	146
Parties, who may be joined as, and claim damages	24
rights of, under illegal contract, § 51.....	108
Passes, when carrier may issue passes.....	35
when forbidden.....	3, 4, 35
See also TRANSPORTATION.	
Patent Right, when trust protected by, § 53a.....	110
Penalty, for giving free passes.....	4, 36
additional forfeit in case of rebate.....	13
for disobedience of witness.....	18, 19
of carrier for failure to obey order.....	25
for failure to file reports or answer questions.....	31, 32

Penalty —(Continued):	PAGE.
for failure of carrier to keep accounts.....	32, 33
for failure to comply with Safety Appliance Law, § 63.....	131
for violation of Meat Inspection Bill.....	150
for violation of Jeweler's Liability Bill.....	156
Pennsylvania, governed by common law as to trusts, § 60.....	129
Pipe Line Companies, when governed by Interstate Commerce Act.1,	2
gas companies not included in.....	2
Plated Ware, weight and fineness of, prescribed.....	155, 156
Pleading, under Sherman Act, §§ 40b, 46.....	96, 104
summary of complaint against beef trust, § 46.....	103
Pooling by carrier unlawful.....	7
what constitutes, § 15.....	55
when joint through rate is not, § 15.....	55
Post-Mortem Examination, Secretary of Agriculture may direct...	145
Preferences and Advantages, carrier forbidden to give.....	6
Preservatives, when not to apply to meat food products.....	146
Priority, on appeals from orders of Commission.....	26, 27
Proceeding in rem, applicable under Pure Food Bill.....	142, 143
Procedure before Interstate Commerce Commission.....	28, 29
in case rehearing is granted	29
Property of common carrier, value of, must be given.....	33
Publication of rates condition precedent.....	10
Public Policy, forbids carrier to be dealer, § 20.....	67
Purchaser, when excused from payment under Anti-Trust Laws,	
§ 59	123
Pure Food Bill, text of.....	136-144
Questions, common carrier must answer in writing.....	31, 32
Quotations of stock, when not within Sherman Act, § 47.....	104
Railroad, term defined.....	2
what included in definition.....	2
term transportation defined.....	2
common carrier, when.....	2
within Commerce Act.....	2
forbidden to deal in commodities.....	4, 5
owner of, must make reports.....	30-33
See also COMMON CARRIER.	
Railroad Commission, may appear before Interstate Commerce	
Commission	20
Railways, of United States, grouped.....	iv, v
statistics as to.....	v

	PAGE.
Rates, schedule of, to be published and filed.....	7, 8
schedule of, what to contain.....	7, 8
of all terminal charges must be published and posted.....	8
through foreign country must be printed and posted.....	8
change of, must be on notice.....	8, 9
publication of, condition precedent.....	10
published rate only lawful rate.....	10
failure to publish misdemeanor.....	11
published rate deemed only legal rate.....	12
Interstate Commerce Commission may fix.....	21
of payment by carrier for services and instrumentalities.....	23
based on shipper's profits illegal, § 14.....	54
Rebates, prohibited.....	6
granting or soliciting, a misdemeanor.....	11
granting or soliciting, punished by imprisonment.....	11
departure from schedule rate is.....	12
what constitutes under Elkins Act.....	12
forbidden under Elkins Act.....	12
additional penalty for.....	13
Attorney-General must prosecute.....	13
may be recovered for period of six years.....	13
three times total value may be recovered.....	13
may be secured by freight classification, § 18.....	61
indictable under Commerce Act and Elkins Act, § 23.....	73
Rebating, imprisonment for, restored.....	xix
Receipt, or bill of lading, must be given by carrier.....	34
Receivers of carrier, when liable to imprisonment.....	10, 11
criminal liability of.....	14, 15
accounts of, may be examined.....	32
Rehearing, application for, how made.....	28, 29
Remedy of shipper, when not alternative.....	14
of shipper not effected by bill of lading or receipt.....	34
of shipper cumulative.....	35
by mandamus to furnish cars or move traffic.....	36, 37
orders of Commission, legislation as to, § 35.....	87
Reparation, may be ordered by Commission.....	20
Reports and findings of Commission shall be evidence.....	20, 21
copies of, to be furnished.....	21
of carrier must be uniform.....	30-33
of carrier, what to contain.....	30-33
time to file may be extended.....	31
penalty for failure to file.....	31, 32
Commission may require monthly.....	32

INDEX.

175

	PAGE.
Review of order on appeal to Supreme Court.....	26, 27
of lawfulness of order, § 39.....	94
See also APPEAL; ORDER.	
Rhode Island, governed by common law as to trusts, § 60.....	129
Roosevelt, Hon. Theodore, recommendation of, as to power to be given Commerce Commission	x
Route, when carrier may prescribe, § 16.....	57
Rules, under Pure Food Bill, to be uniform.....	138
of Secretary of Agriculture as to inspection of meat foods....	148
Safety Appliance Law, liability of carrier under, § 62.....	131
duty of carrier under, not impaired.....	130
Salary of Commission, fees and expenses.....	29, 30
Sale of steamboats' and carriers' business when not within Sher- man Act, § 48	105
of good will when not within Sherman Act, § 49.....	106
of book when not protected by copyright, § 53.....	110
Samples of goods for export and import.....	143
Schedules of rates and charges must be kept posted.....	8
form of, prescribed by Commission.....	9
failure to publish, misdemeanor.....	11
departure from rate not deemed rebate.....	12
of rates conclusive.....	12
made <i>prima facie</i> evidence.....	28
certified copies of.....	28
Search and Seizure, immunity from, extends to corporation, § 13..	53
Secretary of Commission may certify extracts and reports.....	28
Secretary of Agriculture, duties of, under Pure Food Bill.....	145
may direct post-mortem examination.....	145
Service of order of Commission, how made.....	25
Sessions of Interstate Commerce Commission, where held.....	30
Sheep, to be inspected.....	145
Sherman Act, pleadings under, § 40b.....	96
jurisdiction of Federal courts as to, § 41.....	100
measure of damages under, § 43.....	101
Statute of Limitations, applicable to, § 45.....	102
beef trust unlawful conspiracy under, § 46.....	103
when stock quotations not within, § 47.....	104
when sale of steamboat business not within, § 48.....	105
when sale of good will not within, § 49.....	106
when agreement not to sell goods outside State not within, § 50.	107
illegal contracts under, not enforceable, § 51.....	108
when, cannot abrogate a patent right, § 53a.....	110

	PAGE.
Shipper, can only receive facilities specified in tariffs	10
criminal liability of, for false bill, weights or classification...	16
when, may not prescribe route, § 16	57
must secure certificate of inspection.....	149, 159
Ships, when not within Commerce Act	xv
Sidings, common carrier must furnish.....	5
Silver, standard of articles manufactured from.....	154
South Carolina, Anti-Trust Laws of, § 60.....	129
South Dakota, Anti-Trust Laws of, § 60.....	129
Special Counsel may be employed with consent of Attorney-General.	26
Specimens of food to be examined.....	138
Spur Tracks included in term railroad.....	2
Standard of weight and fineness for gold.....	153
of weight and fineness for silver.....	154
State cannot compel furnishing cars for interstate commerce, § 5..	44
when agreement not to sell goods outside of, not within Sher-	
man Act, § 50.....	107
Anti-Trust laws of, sustained, § 57a.....	121
State Anti-Trust Laws, provisions as to relieving purchaser, § 59..	123
enumerated, § 60.....	126
State Court, when action pending in, no bar in Federal courts,	
§ 41	100
when Federal court cannot enjoin proceedings in, § 54b.....	114
State Laws, when applicable to sale of liquors, §§ 2, 3.....	40, 42
when applicable to articles of gold and silver.....	157
State Statutes as to immunity sustained, § 9.....	48
govern Statute of Limitations under Sherman Act, § 45.....	102
Statistics, required to be furnished by carrier.....	30-33
Statute defining, immunity, § 7	46
Statute of Limitations, two years for damage claims.....	24
applicable to Sherman Act, § 45.....	112
under Employers' Liability Act	136
Steamboats, when sale of business of, not within Sherman Act, § 48.	105
Stock Quotations, when not within the Sherman Act, § 47.....	104
Sumptuary Laws, application of Wilson Act as to, § 2.....	40
Supervision by Federal government over carriers.....	xxv
Supplemental Order, may be made by Commission.....	22
See also ORDER.	

	PAGE.
Supreme Court, direct appeal to, §§ 32, 33	85
Swine, to be inspected.....	145
Switches, included in term railroad.....	2
carrier must furnish.....	5, 6
on private land, rule as to, § 40d	99
Taft, Henry W., comments of, on Tobacco Trust cases.....	xxxiv
Tariffs, must be filed and published.....	8, 9
See also RATES.	
Taxation as to interstate commerce, § 6.....	45
Telegraph Companies, when, may exercise eminent domain, § 61...	130
Tennessee, Anti-Trust Laws of, § 60.....	129
Terminal Facilities included in term railroad.....	2, 3
order of Commission for, how enforced.....	5, 6
Testimony, may be taken before grand jury, §§ 10, 11.....	49
Texas, Anti-Trust Laws of, sustained, § 57a.....	121
Anti-Trust Laws of, § 60.....	129
Through Rates, Commission may prescribe.....	22
See also JOINT RATES.	
Time within which to appeal from order of Commission.....	28
within which questions must be answered.....	31
within which to file uniform accounts may be prescribed.....	31
See also APPEAL.	
Tobacco Trust Cases, importance of.....	xxxi
comments of Mr. Taft as to.....	xxxiv
Trades Unions, legalized by Act of Congress, § 54a.....	113
member of, not to be blacklisted, § 54a.....	113
constitution and by-laws of, what to contain, § 54a.....	114
Traffic, memoranda of movement of, must be uniform.....	32
shipper may compel carrier to move, by mandamus.....	36
Treasurer, Secretary of, to make rules.....	138
Troops, discrimination as to transportation of, § 19.....	62
Trustees of carrier, when liable to imprisonment.....	10, 11
criminal liability of.....	14, 15
forfeiture of, for failure to keep accounts.....	32, 33
Trusts, under Sherman Act, jurisdiction as to, § 41.....	100
liability of individual members of, § 44.....	102
when sale of business of carrier by water is not, § 48.....	105
as to copyrighted books, § 52.....	108
when protected by patent rights, § 53a.....	110
conspiracies at common law, § 57.....	118

	PAGE.
United States, rates from, to foreign country must be printed and posted	8
to have preference in time of war.....	10
conspiracy against, how punished, § 22.....	69
provisions of Revised Statutes as to, § 22.....	71
Utah, Anti-Trust Laws of, § 60.....	129
Value of carrier's property must be given.....	31
Vehicles included in term transportation.....	3
Venue of suits against Interstate Commerce Commission.....	27
of proceedings under Pure Food Bill.....	142
Vermont, governed by rules of common law as to trusts, § 60.....	129
Vessels, importing animals, must procure certificate.....	140
Virginia, governed by rules of common law as to trusts, § 60.....	129
Visitation, power of, at common law.....	xxv
War, preference to Government in time of.....	10
Washington, Anti-Trust Laws of, § 60.....	130
West Virginia, governed by rules of common law as to trusts, § 60..	130
Wilson Act, application of, to sale of liquors, § 2.....	40
construed as to sale of liquors, § 4.....	42
Wisconsin, Anti-Trust Laws of, § 60.....	130
Witness, attendance of, compulsory.....	18
penalty for disobedience by.....	18
deposition, how taken.....	19
foreign witness, fees of.....	20
Wyoming, Constitution of, prohibits trusts, § 60.....	130

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